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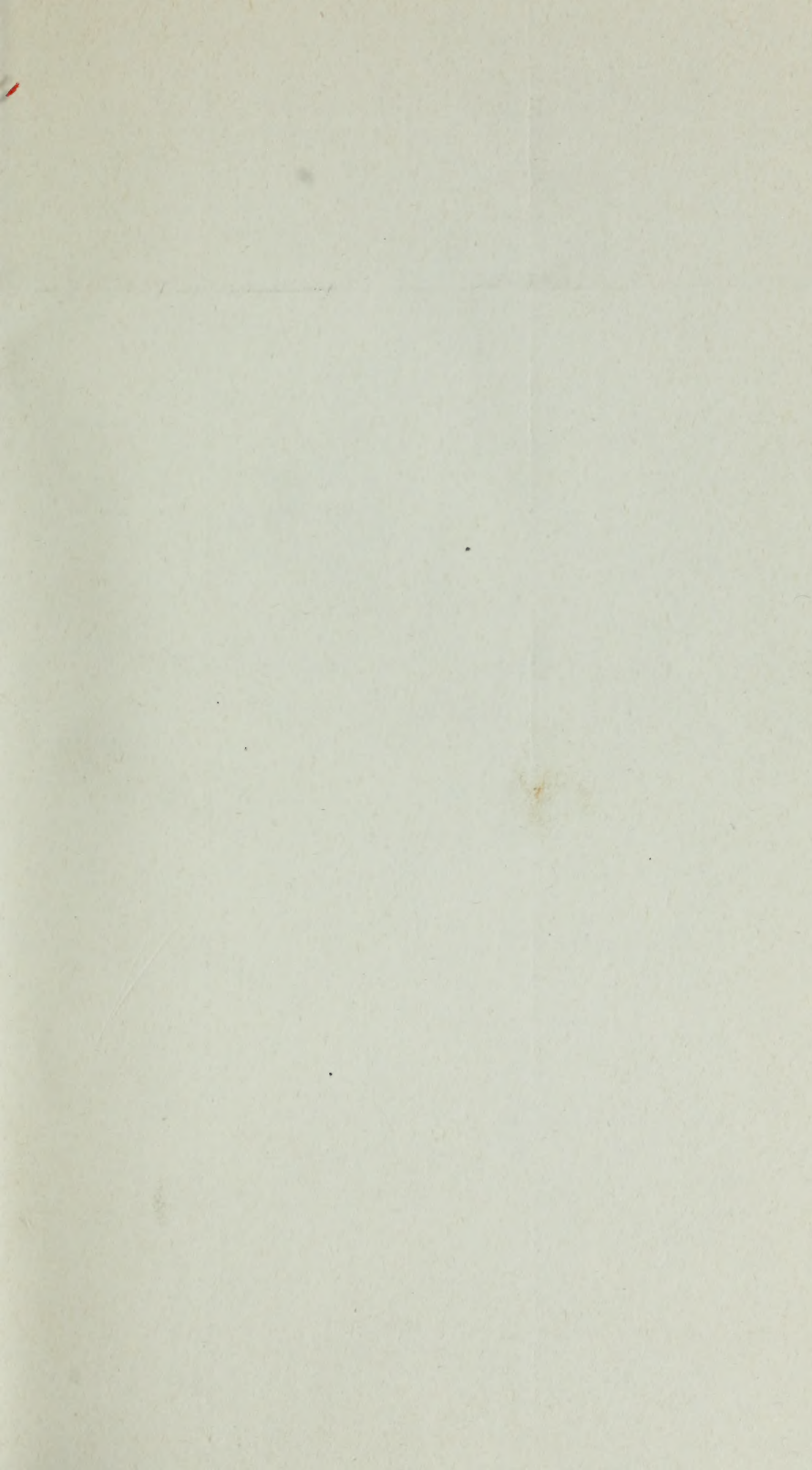
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2588
No. 12286

United States
Court of Appeals
For the Ninth Circuit.

GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENEVIEVE
SANDFORD,

Appellants,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

NOV 25 1949

PAUL P. O'BRIEN, CLERK

No. 12286

**United States
Court of Appeals
For the Ninth Circuit.**

**GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENEVIEVE
SANDFORD,**

Appellants,

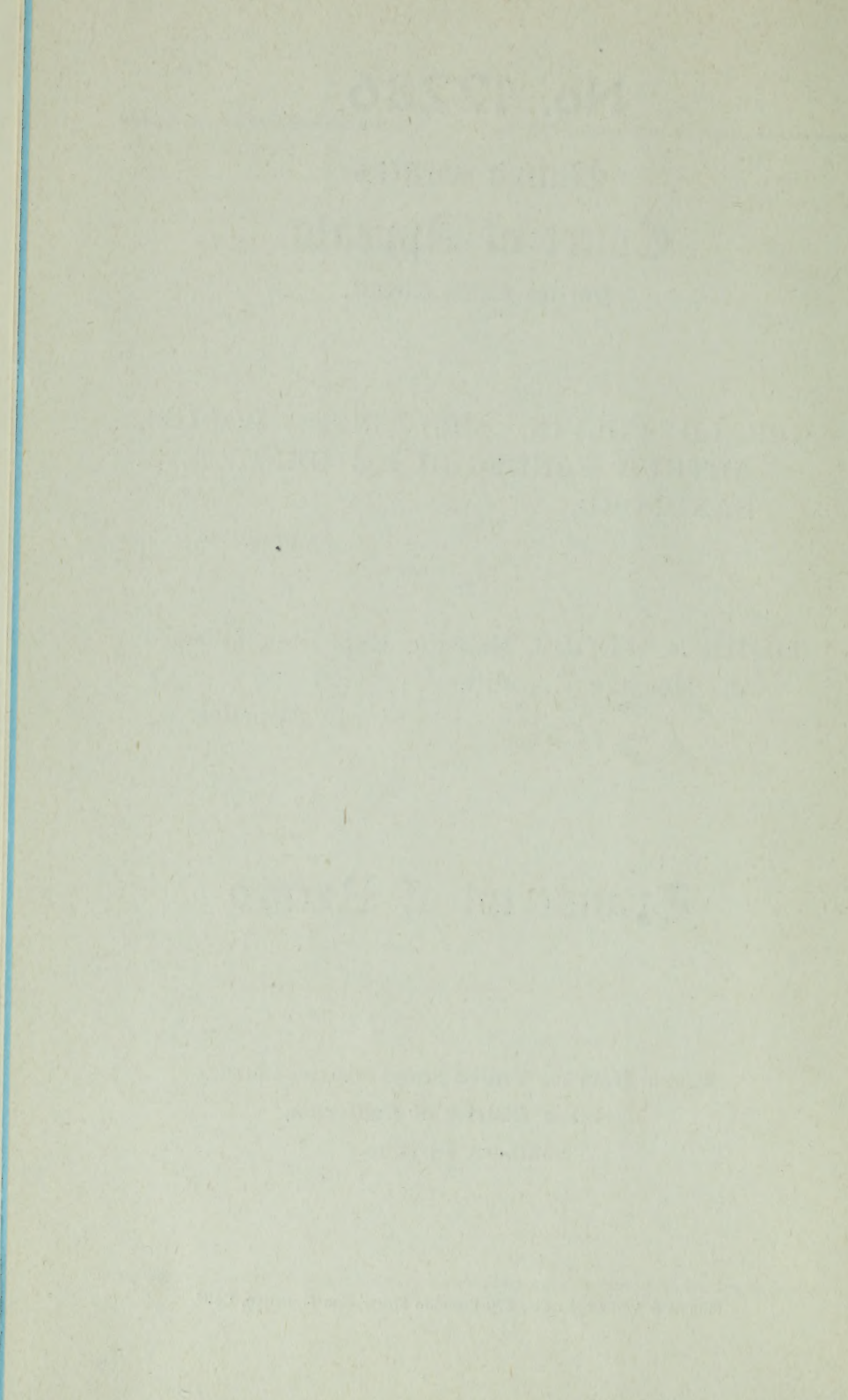
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CARROLL, DAVIS & FREIDENRICH,

900 Balfour Building,
San Francisco, California.

Attorneys for Defendants and Appellants.

SIDNEY FEINBERG,

180 New Montgomery Street,
San Francisco, California.

Attorney for Plaintiff and Appellee.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 28071-G

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

GERALD COLVIN, MRS. ROSE BORIES, AR-
THUR SANDFORD and GENEVIEVE
SANDFORD,

Defendants.

COMPLAINT FOR INJUNCTION
AND RESTITUTION

Count I.

1. In the judgment of the Housing Expediter, the defendants engaged in actions and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended (hereinafter called the Act).

2. Jurisdiction of this action is conferred upon this Court by Sections 205(a) and 205(c) of the Act.

3. At all times mentioned herein, defendants were the landlords of and rented certain housing accommodations located at 438-440 Lilly Street, San Francisco, California, comprising one lower and one upper flat, in the San Francisco Bay Defense-Rental Area.

4. At all times mentioned herein, there has been in full force and effect pursuant to the Act, the Rent Regulation for Housing (8 F.R. 14633), establishing the maximum rentals for the use and occupancy of housing accommodations within the defense-rental area in which the premises referred to in Paragraph 3 above are located.

5. Between May 1, 1947 and June 30, 1947, defendants demanded and received from tenants occupying the premises described in paragraph 3 above, rentals in excess of the lawful rental permitted by the said Regulation, as appears more fully in a schedule marked Schedule "A" attached hereto, and by reference incorporated herein.

Count II.

1. In the judgment of the Housing Expediter, the defendants engaged in actions and practices which constitute a violation of Section 206(a) of the Housing and Rent Act of 1947 (hereinafter called the Act), as amended.

2. Jurisdiction of this action is conferred upon this Court by Section 206(b) of the said Act.

3. Paragraph 3 of Count I is incorporated by reference as though fully set forth herein.

4. Since July 1, 1947, there has been in full force and effect pursuant to the Act, the Rent Regulations under the Housing and Rent Act of 1947, (12 F.R. 4331), establishing maximum rentals for the use and occupancy of housing and rental

accommodations within the defense-rental area in which the premises referred to in Paragraph 3 above are located.

5. Since July 1, 1947, defendants demanded and received and do at this present time demand from tenants occupying the premises described in Paragraph 3 above, rentals in excess of the lawful rental permitted by said Regulation, as appears more fully in a schedule marked Schedule "A" attached hereto, and by reference incorporated herein.

Wherefore, the Housing Expediter demands:

1. That an order issue ordering the defendant to tender to the plaintiff, on behalf of the following named persons, the following sums, said sums being the amount by which the rent demanded and received by the defendants from said persons as rent for the use and occupancy of housing accommodations exceeded the maximum rental established by the Regulation:

| | |
|---------------|----------|
| Monroe Welch | \$275.24 |
| Loui Murrillo | 218.74 |

2. The defendants, and each of them, be permanently restrained and enjoined from charging rents in excess of the legal maximum provided by the aforesaid Act or Regulations promulgated thereunder as they are now or may be hereafter extended or amended.

3. That defendants, and each of them, their attorneys, agents and employees be permanently restrained and enjoined from directly or indirectly violating the provisions of said Act or any Regulations promulgated thereunder, as said Act may be amended and extended.

Dated: May 13, 1948.

/s/ SIDNEY FEINBERG,

/s/ R. K. YOUNT,

Attorneys for Plaintiff.

EXHIBIT A
SCHEDULE

| Tenant | Unit | Date Rented..... | Rent Collected..... | Maximum Legal Rent..... | Number of Overcharges..... | Amount of Each Overcharge..... | Overcharge to Each Tenant..... |
|---|------|---------------------|---------------------|----------------------------|-------------------------------|-----------------------------------|-----------------------------------|
| Monroe Welch, 440 Lilly Street, San Francisco, Calif..... | | 5/1/47 to 7/1/47 | \$50.00 per month | \$25.00 per month | 2 | \$25.00 | \$ 50.00 |
| Monroe Welch, 440 Lilly Street, San Francisco, Calif..... | | 7/1/47 to 2/1/48 | \$60.00 per month | \$25.00 per month | 7 | 35.00 | 245.00 |
| | | | | | | | <u>295.00</u> |
| | | | | | | | — 37.50* |
| | | | | | | | <u>\$257.50</u> |
| | | | | | | | 17.74** |
| | | | | | Total Overchg. | \$275.24 | |
| Loui Murrillo, 438 Lilly Street, San Francisco, Calif..... | | 8/3/47 to 2/1/48 | \$60.00 per month | \$27.00 per month | 6 | \$33.00 | \$198.00 |
| Loui Murrillo, 438 Lilly Street, San Francisco, Calif..... | | 2/1/48 to 3/1/48 | \$30.00 per month | \$27.00 per month | 1 | 3.00 | 3.00 |
| | | | | | | | <u>\$201.00</u> |
| | | | | | | | 17.74** |
| | | | | | Total Overchg. | \$218.74 | |

*\$37.50 for interval between Feb. 1, to Mar. 15, 1948, during which time no rent was paid.

**Utilities paid by tenant which should have been paid by landlord.

[Endorsed] : Filed May 20, 1948.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT FOR
INJUNCTION AND RESTITUTION

Come now defendants above named and answering the complaint of plaintiff herein admit, deny and aver as follows:

I.

Deny the allegations of Paragraphs 1, 2, 4 and 5 of the First Count thereof and specifically deny that this Court has jurisdiction over the subject matter of the cause set forth in said First Count.

II.

Deny the allegations of Paragraphs 1, 2 and 5 of the Second Count.

III.

Aver that defendants have not been the owners of the property described in said complaint since the 20th day of March, 1948 and did on that day sell said property to its present owner and have no further interest therein; defendants further aver that they neither own nor operate any other controlled housing accommodations in the San Francisco Bay Defense Rental Area and that the relief sought by plaintiff by way of an injunction against defendants enjoining them from future violations of the Rent and Housing Act of 1948 or any regulations promulgated thereunder is inappropriate and unnecessary by reason of the averments set forth herein.

Wherefore, defendants pray that plaintiff take nothing by his said complaint and that the relief sought therein be denied and that they be henceforth dismissed with their costs of suit incurred therein.

CARROLL, DAVIS &

FREIDENRICH,

Attorneys for Defendants.

[Endorsed]: Filed July 17, 1948.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

Pursuant to the provisions of Rule 36, as amended, of the Federal Rules of Civil Procedure, plaintiff requests defendants, Gerald Colvin, Mrs. Rose Bories, Arthur Sandford and Genevieve Sandford, within ten days from the service hereof, to admit the truth of the following relevant matters of fact, for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at trial:

1. That at all times material to this action, defendants were the landlords of and rented certain housing accommodations located at 438 and 440 Lily Street, San Francisco, California.

2. That the housing accommodations at said address comprise two flats.

3. That the legal maximum rent for the lower flat at 440 Lily Street, San Francisco, California, is \$25.00 per month, furnished.

4. That the legal maximum rent for the upper flat at 438 Lily Street, San Francisco, California, is \$27.00 per month, furnished.

5. That said premises were duly registered with the Area Rent Office for the San Francisco Bay Defense-Rental Area, on or about August 10, 1942.

6. That Exhibit "A" attached hereto is a true and exact copy in form and substance of said registrations.

7. That said registrations provide the landlord shall pay the water bills.

8. That on or about August 3, 1947, defendants rented the flat at 438 Lily Street to one Louis Murillo.

9. That said Murillo remained as *sold* tenant in said flat from on or about August 3, 1947 until on or about March 1, 1948.

10. That for the period from on or about August 3, 1947 until on or about February 1, 1948, defendants demanded and received the sum of \$60.00 per month rental for each and every month of said period.

11. That for the period February 1, 1948 to March 1, 1948, defendants demanded and received the sum of \$30.00 per month rental.

12. That on or about May 1, 1947 defendants rented the flat at 440 Lily Street to one Monroe Welch.

13. That said Welch remained as tenant in said flat from on or about May 1, 1947 until on or about February 1, 1948.

14. That for the period from on or about May 1, 1947 until on or about July 1, 1947, defendants demanded and received the sum of \$50.00 per month rental for each and every month of said period.

15. That for the period beginning July 1, 1947 until February 1, 1948, defendants demanded and received the sum of \$60.00 per month rental for each and every month of said period.

16. That more than thirty (30) days have elapsed from the time said overcharges were made and that said tenant has not filed suit against defendants herein to recover said overcharges.

Dated at San Francisco, California, this 12th day of August, 1948.

/s/ SIDNEY FEINBERG,

/s/ REUEL K. YOUNT,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed Aug. 12, 1948.

FD-102 (Rev. 1-1-64)

DUPLICATE

UNITED STATES OF AMERICA

Form DD-67

OFFICE OF PRICE ADMINISTRATION

REGISTRATION OF RENTAL DWELLINGS (TYPE OR PRINT PLAINLY—DO NOT FOLD)

LANDLORD'S
COPY

GENERAL INSTRUCTIONS

The landlord is required to register separately each rental dwelling unit, whether occupied or vacant. A dwelling unit is a room or a group of rooms for which a single rent is paid. Complete this Registration Statement in triplicate. (If not typewritten, it must be printed in ink on both sides of each page and must be legible.)

Remove carbon, and mail or bring the three copies to the Area Rent Office. Use extra sheets, in triplicate for sections "D," "E," and "F," if necessary.

Maximum

Rent

Date

Effective

Date

SECTION A. MAILING ADDRESS OF LANDLORD

1 Name of Landlord

J. M. Finley

2 Name of Agent

↓

3 Address mail to:

Name J. M. Finley

Address 484 Oak St.

City and State S. F. Calif

SECTION C. MAXIMUM RENT.—Read carefully and fill in every item which applies to this dwelling unit.

1 Rent on "Maximum Rent date" \$ 27.00 per week () per month ()

2 Not rented on "Maximum Rent date" but rented at any time during the two-month period ending on "Maximum Rent date" \$ 194 per week () per month ()

Date last rented during that two-month period: per week () per month ()

Rent on that date: \$ per week () per month ()

3 Not rented on "Maximum Rent date" nor at any time during the two-month period ending on "Maximum Rent date," but rented after "Maximum Rent date" \$ 194 per week () per month ()

Check one box if applicable:

☐ (a) Owner-occupied or vacant on "Maximum Rent date" and during two-month period ending on "Maximum Rent date"

☐ (b) Newly constructed without priority rating

☐ (c) Newly constructed with priority rating (If checked, item 6 must also be filled in)

Date first rented after "Maximum Rent date" per week () per month ()

Rent on that date: \$ per week () per month ()

4 Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after "Maximum Rent date" \$ 194 per week () per month ()

Date first rented after such change per week () per month ()

Rent on that date: \$ per week () per month ()

5 Substantially changed after "Maximum Rent date," but before the "effective date" Check one box if applicable:

☐ (a) From unfurnished to fully furnished

☐ (b) From fully furnished to unfurnished

☐ (c) By a major capital improvement AS DISTINGUISHED FROM ORDINARY REPAIR, REPLACE

MENT AND MAINTENANCE

Date first rented after such change" \$ 194 per week () per month ()

Rent on that date: \$ per week () per month ()

Dwelling unit previously constructed with a priority rating from the United States or any agency thereof

Rent applicable to such rating: \$ per week () per month ()

7 THE MAXIMUM RENT FOR THIS DWELLING UNIT IS \$ 27.00 per week () per month ()

Enter Maximum Rent in accordance with the following instructions:

(a) If you own the dwelling unit, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(b) If you are a tenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(c) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(d) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(e) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(f) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(g) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(h) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(i) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(j) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(k) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(l) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(m) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(n) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(o) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(p) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(q) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(r) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(s) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(t) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(u) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(v) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(w) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

(x) If you are a subtenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

IDENTIFICATION

1 438 Lily St.

2 Upper flat

3 Number of rooms in unit being registered

4 Total number of dwelling units in this structure

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant P. Masino

Address 438 Lily St.

City and State S. F. Calif

SECTION D. EQUIPMENT AND SERVICES

Check the equipment and services included in the rental agreement and indicate the month, year, date you entered in Section C (1) (2) (3) (4) (5) (6) (7) (8) (9) (10) (11) (12) (13) (14) (15) (16) (17) (18) (19) (20) (21) (22) (23) (24) (25) (26) (27) (28) (29) (30) (31) (32) (33) (34) (35) (36) (37) (38) (39) (40) (41) (42) (43) (44) (45) (46) (47) (48) (49) (50) (51) (52) (53) (54) (55) (56) (57) (58) (59) (60) (61) (62) (63) (64) (65) (66) (67) (68) (69) (70) (71) (72) (73) (74) (75) (76) (77) (78) (79) (80) (81) (82) (83) (84) (85) (86) (87) (88) (89) (90) (91) (92) (93) (94) (95) (96) (97) (98) (99) (100)

1. EQUIPMENT YES NO

Furniture

Hot Water

Hot Water

Hot Water

Hot Water

Hot Water

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WARNING

See 42 Equipment and services included in the rental agreement. If you are a tenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

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See 42 Equipment and services included in the rental agreement. If you are a tenant, enter the Maximum Rent as the rent received for the most recent date except the date of item 6.

SECTION E.—See Note Section C.7

If item 4(a) or 5 of Section C was filled in, enter the date of item 4(a) or 5 of Section C.

(a) New construction

(b) A change in the number of dwelling units

(c) A change in the number of dwelling units

(d) A change in the number of dwelling units

(e) A change in the number of dwelling units

(f) A change in the number of dwelling units

(g) A change in the number of dwelling units

(h) A change in the number of dwelling units

(i) A change in the number of dwelling units

(j) A change in the number of dwelling units

(k) A change in the number of dwelling units

12. That on or about May 1, 1947 defendants rented the flat at 440 Lily Street to one Monroe Welch.

13. That said Welch remained as tenant in said flat from on or about May 1, 1947 until on or about February 1, 1948.

14. That for the period from on or about May 1, 1947 until on or about July 1, 1947, defendants demanded and received the sum of \$50.00 per month rental for each and every month of said period.

15. That for the period beginning July 1, 1947 until February 1, 1948, defendants demanded and received the sum of \$60.00 per month rental for each and every month of said period.

16. That more than thirty (30) days have elapsed from the time said overcharges were made and that said tenant has not filed suit against defendants herein to recover said overcharges.

Dated at San Francisco, California, this 12th day of August, 1948.

/s/ SIDNEY FEINBERG,

/s/ REUEL K. YOUNT,

Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed Aug. 12, 1948.

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[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS

Come now defendants above named and answering the Request for Admissions heretofore filed herein, make the following answers thereto, subject to all pertinent objections to admissibility which may be interposed at the time of trial and without prejudice to any rights which they may have or any defenses that they may urge or rely upon, and state as follows:

These defendants do not have sufficient information, knowledge or belief to enable them to truthfully either admit or deny matters of fact numbered 3 to 8, inclusive, and specifically deny matters of fact numbered 9 to 15, inclusive.

CARROLL, DAVIS &
FREIDENRICH,

Attorneys for Defendants.

State of California,

City and County of San Francisco—ss.

Rose Bories, being first duly sworn, deposes and says:

That she is one of the defendants in the foregoing action; that she has read the foregoing Answer and that the same is true according to the best of her knowledge and belief, except the matters therein

stated to be upon information and belief, and as to those matters she believes it to be true.

/s/ ROSE BORIES,

Subscribed and sworn to before me this 29th day of September, 1948.

[Seal] /s/ LURIE M. REINCKE,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 19, 1950.

Receipt of a copy acknowledged.

[Endorsed]: Filed Oct. 5, 1948.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

I am of the opinion that defendants' objections to the admissibility of the registration statements (plaintiff's Exhibits 1 and 2 for identification) are not well taken. The proper foundation for their admission as official records of the Office of the Housing Expediter was made. They are admissible as such official records. 28 USC 1733(b); 28 USC 1732.

Woods v. Swank (5 Cir.) 170 Fed. 2d 885, cited by defendants, does not purport to hold that such registration statements are per se inadmissible, but only that the facts were insufficient to justify admission in evidence in that case. If under the

authority of *Woods v. Swank*, the statements here must be rejected, I do not feel compelled to follow in this circuit, the cited decision, for to do so, would in my opinion, contrary to Congressional intent, frustrate the just enforcement of the Price Control Act, in a case where the facts require a judgment for plaintiff.

It having been stipulated that judgment may go for plaintiff as prayed, if the statements are admitted, it is so ordered.

Dated: March 25th, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

[Endorsed]: Filed Mar. 28, 1949.

United States District Court for the Northern
District of California, Southern Division

No. 28071-G

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Plaintiff,

vs.

GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENEVIEVE
SANDFORD,

Defendants.

JUDGMENT

Pursuant to the Order for Judgment herein,
dated March 25, 1949,

It Is Hereby Ordered, Adjudged and Decreed, that the above named defendants be and they hereby are required and directed to forthwith refund to the Plaintiff on behalf of the following named persons, the following sum:

| | |
|---------------|----------|
| Monroe Welch | \$275.24 |
| Louis Murillo | \$218.74 |

and that payment of the aforesaid amounts to be refunded be made to the Treasurer of the United States on behalf of the aforesaid persons, or in the alternative, to the Treasurer of the United States, said payment to be made at the office of the Litigation Section of the Office of Housing Expediter, San Francisco Regional Office, San Francisco, California.

It Is Further Ordered, Adjudged and Decreed that the above named defendants, and each of them, their attorneys, agents, and employees, be and they hereby are permanently restrained and enjoined from charging rents in excess of legal maximum rents provided by the Housing and Rent Act of 1947, as extended or amended, or of the rent regulations issued pursuant thereto, or from directly or indirectly otherwise violating said Act and rent regulations.

Dated this 1st day of April, 1949.

/s/ LOUIS GOODMAN,
U. S. District Judge.

Entered in Civil Docket April 4, 1949.

[Endorsed]: Filed April 1, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Gerald Colvin, Mrs. Rose Bories, Arthur Sandford and Genevieve Sandford, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in the above-entitled action on April 1, 1949.

CARROLL, DAVIS &
FREIDENRICH,

By /s/ DAVID FREIDENRICH,
Attorneys for Defendants and
Appellants.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Appellants herein hereby designate the following portions of the record, proceedings and evidence to be contained in the record on appeal as follows:

- a) All of the pleadings herein.
- b) All exhibits introduced at the time of trial.
- c) Reporter's transcript of the evidence adduced at the trial of the cause.

Dated: June 30, 1949.

CARROLL, DAVIS &
FREIDENRICH,

Attorneys for Appellants.

Receipt of a copy acknowledged.

[Endorsed]: Filed July 1, 1949.

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A (440 Lily St.) attached to document 4 (Request For Admissions) except Exhibit A is form DD-U Landlord's copy and Plaintiff's Exhibit No. 1 is form DD2-D Area Office Copy stamped 47817 Aug. 10, 1942. See photostat page 11.]

PLAINTIFF'S EXHIBIT No. 2

[Plaintiff's Exhibit No. 2 is identical to Exhibit A (438 Lily St.) attached to document 4 (Request For Admissions) except Exhibit A is form DD-U Landlord's copy and Plaintiff's Exhibit No. 2 is form DD2-D Area Office Copy stamped 47819 Aug. 10, 1942. See photostat page 13.]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents and accompanying exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the attorneys for the appellants;

Complaint for Injunction and Restitution.

Answer to Complaint for Injunction and Restitution.

Request for Admissions.

Answer to Request for Admissions.

Order for Judgment.

Judgment.

Notice of Appeal to Circuit Court of Appeals.

Designation of Contents of Record on Appeal.

Plaintiff's Exhibits Nos. 1 and 2.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 5th day of July, A.D. 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12286. United States Court of Appeals for the Ninth Circuit. Gerald Colvin, Mrs. Rose Bories, Arthur Sandford and Genevieve Sandford, Appellants, vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 6, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals

No. 12286

GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENEVIEVE
SANDFORD,

Appellants,

vs.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee.

APPELLANTS' STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Appellants herein intend to rely upon the following points in connection with their appeal from the judgment heretofore entered against them in the District Court:

I.

The trial court erred in admitting into evidence the two rent registration statements offered on behalf of the appellee.

II.

Their admission into evidence was improper for the following reasons:

a) No proper foundation was laid for their introduction into evidence;

b) Said rent registration statements were not the best evidence;

c) Said rent registration statements were hearsay as against the appellants.

Appellants hereby designate the following portions of the record which are material to the consideration of this appeal:

- 1) Complaint and answer thereto;
- 2) Transcript of testimony adduced at the trial of the cause;
- 3) All exhibits received in evidence by the trial court.

Dated: July 11, 1949.

CARROLL, DAVIS &
FREIDENRICH,

Attorneys for Appellants.

Receipt of a copy acknowledged.

[Endorsed]: Filed July 13, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S COUNTER-DESIGNATION
OF RECORD

Appellee hereby designates the following additional parts of the record which are material to the consideration of the appeal in this case:

1. Plaintiff's Request for Admissions.
2. Defendant's Answer to Plaintiff's Request for Admissions.
3. Plaintiff's Motion for Summary Judgment.
4. Order for Judgment.
5. Judgment.

Dated this 20th day of July, 1949.

/s/ SIDNEY FEINBERG,
Attorney, Office of
Housing Expediter.

Affidavit of service by mail attached.

[Endorsed]: Filed July 20, 1949.



No. 12286

United States
Court of Appeals
For the Ninth Circuit.

GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENIEVE
SANDFORD,

Appellants,

VS.

TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED
MAR 2 - 1950



No. 12286

**United States
Court of Appeals**
For the Ninth Circuit.

**GERALD COLVIN, MRS. ROSE BORIES,
ARTHUR SANDFORD and GENIEVE
SANDFORD,**

Appellants,

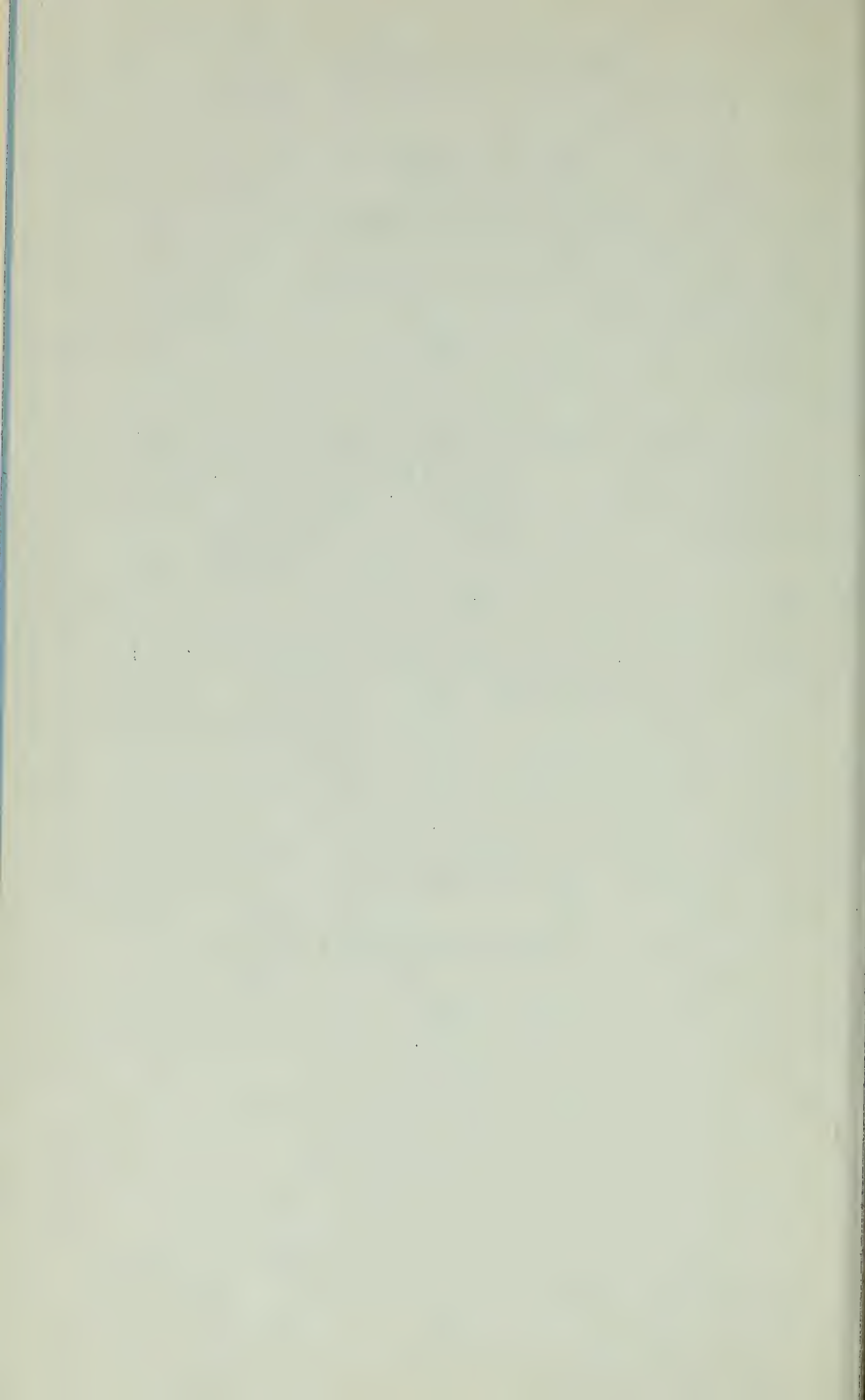
vs.

**TIGHE E. WOODS, Housing Expediter, Office of
the Housing Expediter,**

Appellee.

SUPPLEMENTAL
Transcript of Record

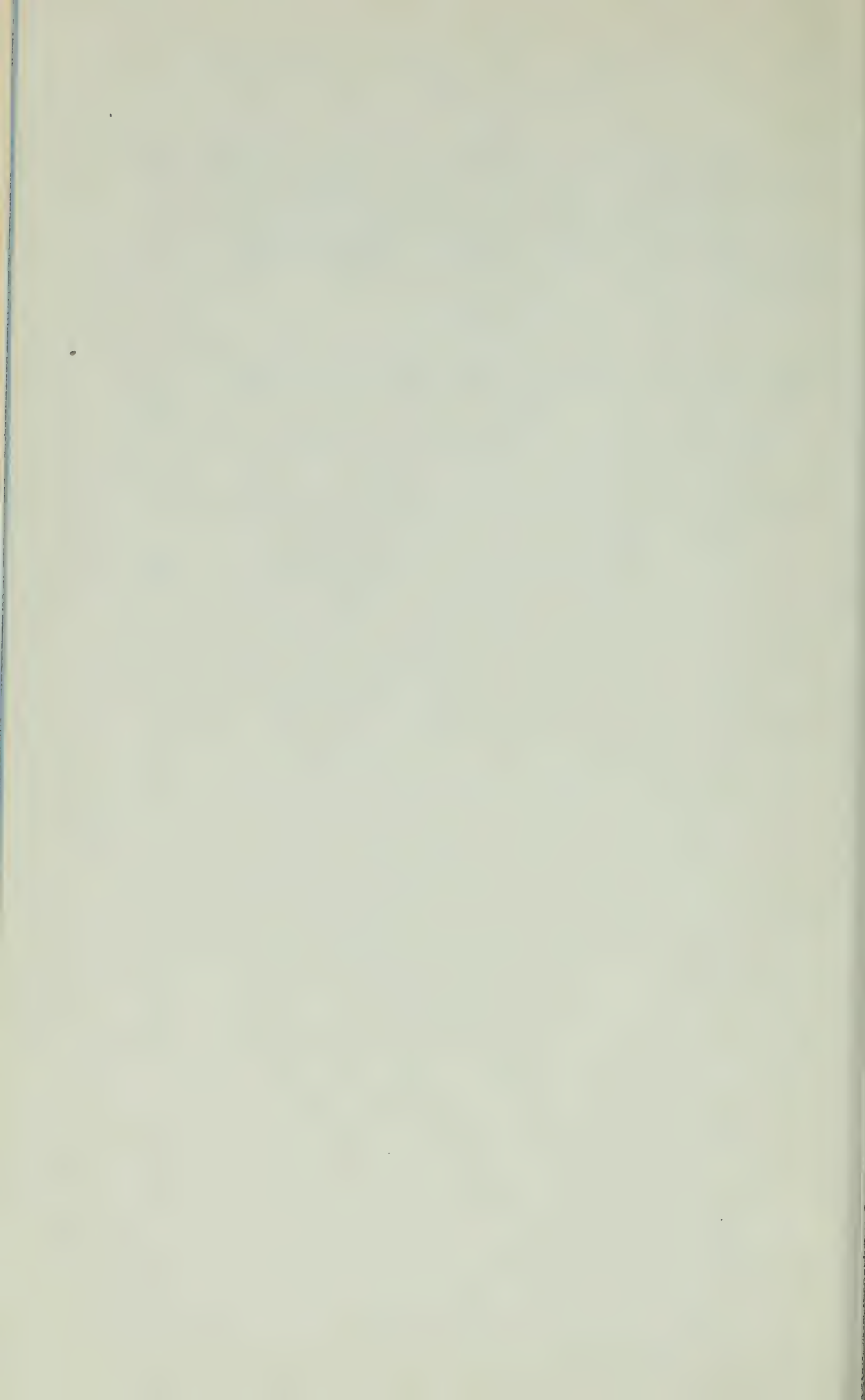
**Appeal from the United States District Court,
Northern District of California,
Southern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States
District Court for the Northern District of
California

No. 28,071-G

Before: Hon. Louis E. Goodman,
Judge.

TIGHE E. WOODS,

Plaintiff,

vs.

GERALD COLVIN, et al.,

Defendant.

REPORTER'S TRANSCRIPT

February 28, 1949

Appearances:

J. GREGORY DONOHUE, ESQ.,
For the United States.

DAVID FREIDENRICH, ESQ.,
For the Defendant.

The Clerk: Woods v. Colvin.

Mr. Donohue: Ready.

Mr. Freidenrich: Ready.

Mr. Donohue: If your Honor please, this is a suit involving two different apartments, flats, located at 440 Lily Street, in San Francisco—440 and 438 Lily Street. There are two tenants involved. The suit is brought for an order of restitu-

tion, both under the prior act and under the present act.

The maximum rents in our request for admissions have been denied. I don't know whether any facts exist that we can stipulate to or not. Counsel?

Mr. Freidenrich: The request for admissions, we did neither admit nor deny. We stated that we did not know what the actual legal rents were.

Mr. Donohue: I do have here the registration for these particular premises.

The Court: Well, is there any dispute as to whether this registration statement is correct or not?

Mr. Freidenrich: No, we do not dispute the registration statement is a registration statement. But that, in our opinion, does not determine what the maximum rent is. That is simply a report.

The Court: Well,—

Mr. Freidenrich: Not by the defendants in this action, you [2*] see, but by some third person.

The Court: The registration statement was by a prior owner of the place?

Mr. Freidenrich: Yes, your Honor.

The Court: Well, can't you stipulate to that, that that is so, and then leave the remaining question to be presented?

Mr. Freidenrich: We would stipulate that this report was filed with the old OPA, yes, your Honor, but we would not be able to stipulate as to whether it is correct or not. We have no way of knowing

* Page numbering appearing at top of page of original Reporter's Transcript.

that. This is simply a report of what the rent was on a certain date. It might be right; it might be wrong. And we don't know anything more than that.

The Court: Well, this is the registration, this is the statement that was filed with the OPA. That might be considered as a statement that was filed on—what is the date of it?

Mr. Donohue: August 10, 1942.

The Court: That is it.

Mr. Donohue: In each instance, they are dated the same date. Both registration statements are dated August 10, 1942.

The Court: Then it may be marked in evidence as a statement that was in the OPA records?

Mr. Freidenrich: Well, if your Honor please, I did intend to object to its introduction in evidence, and if your Honor would care to, I would like to be heard on that as a matter of legal evidence. I don't know whether this is the time to take [3] that up or not, but I am prepared.

The Court: Well, I don't take much time on these OPA cases. I have got too many cases to try and I ask counsel to get right down to the meat of it. What is the question involved in this case, for example? What is it that is in dispute here?

Mr. Donohue: Well, so far as we know, your Honor, the maximum rent, it is just a question of straight overcharges.

The Court: Is there any dispute as to the amount of money paid by the tenants?

Mr. Freidenrich: No dispute as to the amount of money paid, no, your Honor.

The Court: By the tenants over the periods during which they paid it?

Mr. Freidenrich: That's correct.

The Court: You can stipulate to that?

Mr. Freidenrich: That is correct.

The Court: Then the only question in the case is whether or not that was an excess payment or not?

Mr. Freidenrich: That is correct, your Honor.

The Court: Well, then, we don't even need any witnesses on this matter, do you?

Mr. Freidenrich: Well, that may not be true. But we believe that these reports are not admissible in evidence on the establishing of the maximum legal rent.

The Court: Then that is the question?

Mr. Freidenrich: That is the question. [4]

The Court: As to whether or not that is the maximum legal rent or not.

Mr. Freidenrich: That is correct, your Honor, from these reports. Now, if they have a witness who might testify as to what the rent actually was on the freeze date, which was March 15, 1942, that is another matter.

The Court: Well, then, may we have an understanding that that is the issue in this case and that if that is the maximum rent, the plaintiff is entitled to judgment, and if it isn't the maximum rent, the plaintiff is not entitled to a judgment?

Mr. Freidenrich: Well, we will so stipulate, your Honor.

The Court: Is that agreeable?

Mr. Donohue: That is agreeable.

The Court: All right, then we will just confine ourselves to these registration statements, so-called registration statements, and see where we go from there.

Mr. Donohue: I will call Mrs. Keil.

The Court: Very well.

EDITH KEIL

called on behalf of the plaintiff; sworn.

Q. (By the Clerk): Will you state your name to the Court?

A. Edith Keil, K-e-i-l.

Direct Examination

By Mr. Donohue:

Q. By whom and in what official capacity [5] are you employed, Miss Keil?

A. I am a rent examiner for the Office of the Housing Expediter.

Q. In that capacity, do you have custody and control, are you one of the persons having custody and control, of the official records relative to the maximum rents for premises located within the San Francisco Bay rental area? A. I am.

Q. I hand you these documents——

Mr. Freidenrich: Counsel, may I see those?

(Testimony of Edith Keil.)

Mr. Donohue: I thought you looked at them.

Mr. Freidenrich: I didn't look at them carefully.

(Documents examined by Mr. Freidenrich.)

Q. (By Mr. Donohue): I hand you this document and ask you to identify that document.

A. It is a registration for the lower flat at 440 Lily Street, \$25 per month is the maximum rent.

Q. And I hand you this document and ask you to identify it.

A. That is for the upper flat at 438 Lily Street, legal maximum rent \$27.

Q. Are those official records of your office, Miss Keil? A. They are.

Mr. Donohue: We offer these two documents into evidence.

Mr. Freidenrich: Now, if your Honor please, at this time we wish to interpose an objection, upon the ground that no proper foundation has been laid for the introduction of the [6] documents, that they are not the best evidence, that they are hearsay as to the defendants in this action, and I am prepared, if your Honor will permit me, to make a statement in that regard.

The Court: Yes, I will be glad to hear you. Before you do that, would you mind telling me, Mr. Freidenrich, who the defendant is that you represent and what his connection with this property is?

Mr. Freidenrich: I represent all of the defend-

(Testimony of Edith Keil.)

ants, your Honor, four defendants. And they did own the property during the time in question. They own it no longer. And so far as I know, they own no other controlled housing accommodations at this time.

The Court: And are you in a position to say when they became the owners of this property?

Mr. Freidenrich: Yes, your Honor. Excuse me, your Honor. They became the owners of the property on June 25, 1947.

The Court: Oh, I see. These registration statements were filed on August the 10th of 1942 by J. M. Finlay, who was then the landlord?

Mr. Freidenrich: Presumably, yes, your Honor.

The Court: All right.

Mr. Freidenrich: Now, in that connection, these registration statements that are offered here by the plaintiff in evidence are simply reports by someone as to what rent he was [7] receiving on the maximum rent date. The maximum rent, the rent regulation for housing, which was issued under the first act, the Emergency Price Control Act of 1942, defines maximum rent as follows: Section 4, which incidentally is pertinent because the complaint alleges there is a violation of Section 4A.

I will read to your Honor Section 4:

“Section 4. Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in Section 5) shall be:

(Testimony of Edith Keil.)

“a. Rented on maximum rent date. For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.”

In other words, the actual rent that was paid on March 1, 1942 is the maximum rent for any specific housing accommodations. Thereafter, as your Honor knows, landlords had to report what their rents were on that date. That report date didn't occur until after July 1st of 1942 when the act went into effect.

Now, in our opinion, this report is no different than any other report of a private citizen that is filed with some public agency, and one specific example which comes to mind is the filing of an income tax return or report. And this Court, or at least this Circuit, had that matter before it in a case entitled *Greenbaum v. The United States*, in 80 Fed. 2d. 113. That was a case where the defendant, where Greenbaum, apparently was prosecuted for income tax evasion by the Government, and [8] in order to show income for prior years, they brought in, or they offered in evidence, returns filed by someone else reporting on defendant's business. And in the course of the opinion on appeal, the Circuit Court of Appeals states:

“A proper ruling on this assignment——”
which was an assignment of error,
“——requires, first, a consideration of a full income tax return as evidence of the true state of

(Testimony of Edith Keil.)

the company. A return is a statement by the taxpayer or by someone on his behalf, hence hearsay and only receivable in evidence as an admission. An admission is evidence against him who made it, or, under the proper circumstances, against his principal, co-conspirator or co-adventurer. The fact that income tax returns are public records (in quotes) can not lend them a greater evidentiary value than they intrinsically possess. In this respect a taxpayer's return differs from an assessment book showing facts gleaned from the observation of a public official in the regular course of duty, which facts may be proved by the books alone under the public record exception to the hearsay rule.

"Since the prosecution failed to show that the Greenbaums had any relationship with the accounting of the grocery business, even the original tax returns would not be receivable as their admissions.

"An equally serious error committed in the reception of [9] these cards was the inexplicable violation of the best evidence rule.

"Assuming that the cards introduced in evidence in this case were public records within the meaning of the above cases, that conclusion does not cure the violations of the hearsay and best evidence rules discussed above. Giving them the full import of the public records rule is merely to conclude that the figures on the card were accurately tran-

(Testimony of Edith Keil.)

scribed from an income tax return in Washington. It throws no light on who signed the original return, hence makes the original return no less inadmissible hearsay."

The Court: Was this a suit for refund of taxes?

Mr. Freidenrich: No, this was a criminal suit.

The Court: This was a suit for fraud in filing of an income tax return?

Mr. Freidenrich: Yes, this was a criminal suit, and this evidence was admitted apparently in the District Court and the Circuit Court of Appeals reversed it and held that the introduction of these income tax returns prepared by someone else, no connection with the defendants, violated the hearsay rule, and also violated the best evidence rule. And we contend——

The Court: The returns were themselves prepared by someone else?

Mr. Freidenrich: Yes, your Honor.

The Court: Well, aren't there—I didn't want to interrupt [10] your argument—some other provisions of the OPA law, with respect to the filing of these statements and regulations issued pursuant to them, that state how the maximum rent shall be determined?

Mr. Freidenrich: Well, if your Honor please, the maximum rent, as I read it to your Honor, is defined in Section 4 as the rent for housing accommodations rented on the maximum rent date. The rent for such accommodations on that date. Now,

(Testimony of Edith Keil.)

the question is how do you prove what the rent was? Now, the plaintiff in this case attempts to prove the rent, which is the basis of its case, by offering a registration statement or statements filed by, presumably, the landlord at that time with it. Now, as to him, that is one thing. That might be an admission, or it could be used against him as an admission. But as to us, a subsequent owner, we contend that it is not admissible. They don't produce the landlord to at least identify his signature, so that we contend no proper foundation has been laid. In addition to that, it is hearsay to us. And thirdly, it is not the best evidence, it is simply a report by someone as to what the rent was; and just as the Court said in this income tax matter, the fact that it is filed with a public authority and becomes a public record doesn't make it any more, or doesn't give it any more evidentiary value than if it weren't filed. It is simply a report.

The Court: Well, isn't there something on that, aren't [11] there decisions and regulations as to the effect of these registration statements?

Mr. Donohue: Yes, your Honor, there is a most recent decision, in *Woods v. Tate*. I believe the decision is not yet officially reported. It may be in 170 Fed. 2d. by the Fifth Circuit. In this case the point was raised. The Court held that a registration was an official record and was entitled to be regarded as *prima facie* evidence of what the maximum rent was, as an official record. And hav-

(Testimony of Edith Keil.)

ing been introduced into evidence by one of the persons having custody of that record, that it is admissible into evidence. And furthermore, I believe there has been a recent amendment to it, permitting any government agency report to be used in evidence. I believe there is a recent amendment of that rule, in the rules themselves. Not the federal rules, but relating to the official reports. But if your Honor has available here 170 Fed. 2d., I believe——

The Court: 170 Fed. 2d?

Mr. Donohue: Yes.

The Court: Is it bound?

Mr. Donohue: No, it is in the advance sheets.

The Court: Well, there are several advance sheets for 170.

Mr. Donohue: Well, it is the last issue, *Woods v. Tate*. It is in the Fifth Circuit. It is 171, I believe, instead of 170. [12]

Mr. Freidenrich: While we are waiting, if your Honor please, I would like to finish from this quotation in this case.

The Court: Yes, go right ahead.

Mr. Freidenrich (Reading):

“The public nature of these cards may vitiate hearsay in the transcript, but it can not vitiate hearsay in what is transcribed. The fact that a record is public adds nothing to what is recorded.

“Defendants had opportunity to cross-examine neither the unknown person who made the original

(Testimony of Edith Keil.)

return nor the person who transcribed the purported entries therefrom.”

And in this case, of course, we do not have the opportunity to cross-examine the party who filed this original registration statement. It may be wrong; it may have been recorded with the wrong rent on it. Those things have occurred.

Now, I would also like to cite to your Honor a further case, and that is an OPA case, of *Bowles v. Kennemore*, in 139 Fed. 2d. 541, where the trial courts dismissed an injunction action similar to this, brought by the Price Administrator against the defendant upon the ground that the signature of the defendant, the defendant himself, to a report purportedly filed by the defendant with the government, the War Price and Rationing Board, had not been properly identified. The defendant refused to testify, and no one was produced who could [13] identify the defendant's signature. The appellate court reversed it, upon the ground that other evidence of the defendant's signature had been introduced sufficient to enable the lower court to determine that the signature on the report filed with the ration board was the signature of the defendant. But it is a reasonable inference that if the report that was offered in evidence for the signature of someone other than the defendant in that case, and the Government had produced no one to identify the signature, that obviously the lower court's decision would have stood. The only

(Testimony of Edith Keil.)

reason it was reversed is because apparently there was some evidence introduced as to the bearing on the question of the validity of the signature. But here there is no attempt to even verify the signature, and that goes to the question of lack of proper foundation.

But of course, if that were——

The Court: Well, according to that theory, Mr. Freidenrich, the enforcement of this statute could be completely aborted in the case of any property owner who formerly owned property and filed a registration statement upon the ground that if that former property owner could not be obtained, his presence could not be obtained by the OPA, in enforcing this statute, to show whether or not he actually filed this document,——

Mr. Donohue: As a simple rule of evidence, an admission of a predecessor in interest or title is certainly admissible as against a subsequent owner, just as a common matter of evidence. [14] A registration statement is a statement or an admission by the defendant as to the facts pertaining at a particular date. A subsequent owner acquires title to the property, the admissions of the subsequent parties in interest are binding on a subsequent predecessor in interest, just as a matter of common rule of evidence. That decision of *Woods v. Tate*——

The Court: Did you look through that last?

The Law Clerk: I looked through the last bunch we had. The third volume, the third number we

(Testimony of Edith Keil.)

had, of 170 Fed. 2nd, was missing. But I looked through all of 170 and 171.

Mr. Donohue: I believe it was No. 14.

The Law Clerk: No. 14?

Mr. Donohue: It is dated February—the last issue of the Fed. 2d. advance sheet, *Woods v. Tate* is reported, I believe.

The Court: Did this come out today or was it some time ago when you saw it?

Mr. Donohue: It was last week. I saw the decision before it was officially published, but this is in the last one.

The Court: Of course, there is also a section of the Judicial Code which provides for the production of business records.

Mr. Freidenrich: We wouldn't be in possession of records of a former owner.

Mr. Donohue: That, if your Honor please, is what I had reference to a moment ago when I said that particular section was amended. [15]

The Court: Of course, this case was one in which there was an order fixing the rent also made. In this *Tate* case that you refer to. It was an order made by the Rent Director, but directed to a prior owner of the property, and it was offered in evidence in this action for restitution of rents against a subsequent owner. The only difference between that case and this one is that there was an order of a rent director directed to the prior owner of the property, and the question of registration statements itself was not involved.

(Testimony of Edith Keil.)

Mr. Donohue: I believe there was some authorities cited in that opinion in which the question is——

The Court: There are a number of cases cited in here.

Mr. Donohue: The question is not new, as to the admissibility of a registration statement. It has been so long since——

The Court: The Court said here: “The fact that it was addressed to a prior owner of the property did not entitle the defendant to ignore the issuance and existence of this order. The rent regulations contemplate that a subsequent owner will be bound by a rent increase or reduction order issued by or through a previous owner of the same premises. Moreover, when the defendant came into possession of the property, if she lacked knowledge, as to the existence of any orders affecting the maximum rent allowable in the premises it was incumbent upon her to consult with the OPA authorities for such information, [16] in order that rent exacted from her tenant would not be at variance from the regulations. Not having done so, she was legally chargeable with knowledge of the order establishing maximum rent. We do know that this order was presumably valid and genuine, particularly in the absence of any proof or testimony to the contrary.”

Of course, that situation is somewhat different from the situation in this case, except that the

(Testimony of Edith Keil.)

reasoning as to the subsequent owner being bound would be applicable. But it seems to me that there were some cases and regulations that had to do with the filing of these registration statements.

Mr. Donohue: The regulation, of course, itself required a landlord to file the registration statement. Section 7 of the rent regulations requires that the landlord do so, showing what the rent was on the freeze date. And having a prior owner, the basis for it is that this is an official record, and there is testimony from this witness that this is an official record. Official records are presumed to be *prima facie* evidence of the facts therein stated; if they are official records, they are presumed to be regular.

Now, this was filed by a prior owner, and in it he states what the rent was on a particular date. As a matter of the rule of evidence, without regard to an official record, an admission of a prior owner is binding on his successor in interest, just as the rule of evidence. This question is not new. It has been some time since it has been raised. For that reason, I am not — if I had any idea that this matter would be presented, I would have——

The Court: Well, if this is the only question in the case, and if there is some doubt about it, I don't feel I would want to take snap judgment on it. Each side can present some memoranda on it. Offhand I would think——

Mr. Donohue: I think the matter is well set-

(Testimony of Edith Keil.)

tled as to the admissibility of these registration statements.

The Court: No person who acquired property could proceed to fix any rental he wanted without making some inquiry as to what the rent registration was on the property. However, of course, that isn't exactly the point that Mr. Freidenrich makes. His point, as I take it, is as to whether or not this would be sufficient *prima facie* evidence.

Mr. Freidenrich: That is correct, your Honor.

The Court: And offhand, I would think that it would be sufficient *prima facie* evidence, but it may be that Mr. Freidenrich may be right about it, and that there are cases where the enforcement of the OPA laws may become ineffective because of the inability of the Housing Expediter to actually be able to find out whether or not in March of 1942 that was the actual rent that was charged by some prior owner to a prior tenant, to a tenant at that time.

Mr. Freidenrich: I might say, your Honor, that it, and that there are cases where the enforcement I examined [18] the authorities quite thoroughly and couldn't find any decided cases with respect to OPA cases. You know, there is the Greenbaum case, which seemed to be the only case that I could find which was clear on the point, and it is in this Circuit; it seems to be clear as a rule of evidence, aside from whether it is the OPA or someone else. But on a question of evidence,—

The Court: That is a tax case, of course.

(Testimony of Edith Keil.)

Mr. Donohue: On a question of evidence.

Mr. Freidenrich: On a question of evidence it would seem quite clear that it was simply a report, that the government couldn't rely on a report unless they complied with the rules of evidence, the same as anybody else.

The Court: Well, I could see that there was a great distinction between the Greenbaum case and this case because there the question was the criminal responsibility of a taxpayer under a statute which imposed criminal sanctions, and the government there attempting to prove the fraud by furnishing a document that was filed by someone else.

The rent regulations, however, are an entirely different category. They have to do with conditions under which rent may be charged by the owners of property, and there are altogether different intendments that flow from that, that would make this question one of the weight of the testimony, rather than its admissibility. Of course, if it could be shown, or if there was [19] an issue raised and someone came along whom you produced, we will say, and testified, "Well, I was a tenant at 484 Oak Street in March 1944, and I paid \$35 a month and not \$29 a month rent for the place," then there would be an issue of fact raised as to whether or not this showing is overcome. But as to it being necessary for the plaintiff to show by the testimony of a witness the rent that was paid, and that no

(Testimony of Edith Keil.)

other type of testimony could be offered to prove it except the so-called firsthand testimony, either by the man who paid it or the man who received the rent, well, I am inclined to think that it would be a pretty heavy burden upon the part of the defendant in this case to demonstrate that, without that evidence, these records would be wholly of no weight, at least not of sufficient weight or sufficient prima facie weight to justify their admission in evidence. They are worth something, because these are records that are available to the present owner of this property, who could have gone and examined the records to see whether or not such a document was filed. And if there was doubt about it, they could have then proceeded to petition the rent administrator for an order fixing the rents, on the ground that this was an incorrect statement, that that was not the maximum rent. But there must be some credence given to these registration statements which are authorized to be filed by the law and the regulations. However, you see, the question isn't new and you have had it thrust on you today. Mr. [20] Freidenrich, I am sure, feels that there is merit in what he has presented here. Otherwise he wouldn't have presented it. Perhaps you both had better take a little time and we can just submit the matter, if you wish to, on the basis of whether or not these documents may be admitted or not.

Mr. Freidenrich: I would be agreeable to that,

(Testimony of Edith Keil.)

but I would like to call your Honor's attention to the registration statement at 438 Lily Street, in the event your Honor finally——

The Court: 438?

Mr. Freidenrich: Yes, there are two, one at 440 and one at 438.

The Court: Oh, yes.

Mr. Freidenrich: In the event your Honor finally decides to allow them to be introduced in evidence and they are thereafter evidence in the case. Your Honor will note that in that registration statement it can not be observed from it whether that figure that was set forth is rent on the maximum rent date by the week or by the month. It is not filled in.

The Court: Well, there doesn't seem to be any cross after the month, is there, for 440?

Mr. Freidenrich: Either the top or the bottom. So if they are relying upon that as their proof, and it is finally submitted, I submit to your Honor that there is no showing made in that case at all. I might state, if your Honor please,——

Mr. Donohue: Except that this is in connection with the [21] other registration statement. That is an upper and a lower flat in the same premises. The \$25 per month is clearly indicated; it would be an absurdity to assume that it was anything other than, from the document itself, a mere omission to indicate there, that the rent was four times as much on the upper flat. I think that would be an obvious and violent assumption.

(Testimony of Edith Keil.)

Mr. Freidenrich: I don't think it is a question of the Court assuming something; it is just a question of proof. The Court doesn't have the proof before it.

The Court: Well, are you both agreeable to submit the matter on the basis of the Court's ruling on this?

Mr. Freidenrich: Yes, your Honor.

Mr. Donohue: Yes, your Honor.

The Court: All right, then perhaps—have you filed any memoranda at all so far?

Mr. Freidenrich: No, but I can within five days, if your Honor desires.

The Court: Suppose you file—I think probably the burden would be upon you, having made the objection, so suppose you file the first memorandum in five days and then Mr. Donohue can file a reply in five days.

Mr. Donohue: Yes, sir.

The Court: And then if you wish to take *time reply*, you may do that, and take another five days. Then we will just mark [22] the matter submitted on the cause then. I think that we did everything else that we need for the purpose of deciding the case.

Mr. Freidenrich: That is agreeable.

The Court: All right.

The Clerk: These may be marked 1 and 2 for identification?

AREA OFFICE
COPY

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
 REGISTRATION OF RENTAL DWELLINGS
 (TYPE OR PRINT PLAINLY - DO NOT FOLD)
 (Do Not Use This Form for Hotels and Rooming Houses)

GENERAL INSTRUCTIONS

landlord is required to register separately each rental unit, whether occupied or vacant. A dwelling unit is a group of rooms for which a single rent is paid. Complete Registration Statement in triplicate, remove carbons, and bring the three copies to the Area Rent Office. Use carbons in triplicate, for sections "D" & "E" if necessary. A dwelling unit was not rented at any time during the period between January 1, 1942 and July 1, 1942, an application to establish the Maximum Rent must be made on Form DD-112-2.

SECTION A. MAILING ADDRESS OF LANDLORDName of Landlord J. M. FINLEY

Address of Agent

City and State

J. M. FINLEY484 OAK ST.S. F. CALIF.**IDENTIFICATION**

- 440 LILY ST.
- LOWER FLOOR
- Number of Rooms in this dwelling unit FOUR
- Total Number of dwelling units in this structure TWO

SECTION B. MAILING ADDRESS OF TENANTName of Tenant E. BEATTYAddress 440 LILY ST.City and State S. F. CALIF.**SECTION C. MAXIMUM LEGAL RENT**

Read carefully and fill in every item which applies to this dwelling unit.

Rent on March 1, 1942: \$ 25.00 per week () per month (X)
 not rented on March 1, 1942, but rented at any time between January 1, 1942 and February 28, 1942.
 Date last rented during that two-month period: _____, 1942.
 Rent on that date: \$ _____ per week () per month ()
 not rented at any time between January 1, 1942 and March 1, 1942, but rented before July 1, 1942.
 Check one box:

- () (a) Owner occupied or vacant between January 1, 1942 and March 1, 1942.
 () (b) Newly constructed without priority rating.
 () (c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)

Date first rented after March 1, 1942: _____, 1942

Rent on that date: \$ _____ per week () per month ()

Dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after March 1, 1942, but before July 1, 1942.

Date first rented after such change: _____, 1942

Rent on that date: \$ _____ per week () per month ()

Substantially changed after March 1, 1942, but before July 1, 1942. Check one box:

- () (a) From unfurnished to fully furnished.
 () (b) From fully furnished to unfurnished.
 () (c) By a MAJOR CAPITAL IMPROVEMENT as distinguished from ordinary repair, replacement and maintenance.

Date first rented after such change: _____, 1942

Rent on that date: \$ _____ per week () per month ()

Dwelling unit newly constructed with a priority rating from the United States or any agency thereof.

Rent approved by agency granting priority: \$ _____ per week () per month ()

THE MAXIMUM LEGAL RENT FOR THIS DWELLING UNIT IS:→ \$ 25.00 per week () per month (X)

Enter Maximum Legal Rent in accordance with the following instructions:

- (a) If only one of the above items applies to this dwelling unit the Maximum Legal Rent is the rent entered for that item.
 (b) If more than one of the above items apply to this dwelling unit the Maximum Legal Rent is the rent reported for the most recent date, except in the case of Item 6.
 (c) If Item 6 applies to this dwelling unit the Maximum Legal Rent is the lower of the two rents entered in Item 3 and Item 6.
 (d) If any one of the Items 3(b), 4 or 5 applies to this dwelling unit you must also fill in the information required in Section "E".
 The Administrator may at any time order a decrease in the Maximum Legal Rent determined under Items 3(a), 3(b), 4, or 5, on the grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on March 1, 1942.

Section E - See Note Section C. 7 *

If Item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:

- (a) New construction (c) A change from unfurnished to fully furnished
 (b) A change in the number of dwelling units (d) A major capital improvement

SECTION D. EQUIPMENT AND SERVICES INCLUDED IN THE RENT ON MARCH 1, 1942

(If any one of the items 2 to 5 of Section C apply to this dwelling unit check Equipment and Services included in the rent on the most recent date you entered in Section C.)

| 1. EQUIPMENT | Yes | No |
|-----------------------|-----|-----|
| Furniture | (X) | () |
| Running Water | (X) | () |
| Hot Water | () | (X) |
| Flush Toilet | (X) | () |
| Bathroom | (X) | () |
| Central Heating | () | (X) |
| Heating Stove | (X) | () |
| Mech. Refrigerator | () | (X) |
| Electricity Installed | (X) | () |
| Cooking Stove | (X) | () |

If any equipment is shared, explain below:

| 2. SERVICES | Yes | No |
|-----------------------|-----|-----|
| Garage | () | (X) |
| Heat or Heating Fuel | () | (X) |
| Cooking Fuel | () | (X) |
| Cold Water | (X) | () |
| Hot Water | () | (X) |
| Light | () | (X) |
| Ice or Refrigeration | () | (X) |
| Janitor Service | () | (X) |
| Garbage Disposal | () | (X) |
| Painting & Decorating | (X) | () |
| Interior Repairs | (X) | () |
| Exterior Repairs | (X) | () |

List any other services:

Are all equipment and services indicated above now included in the rent? Yes (X) No ()

WARNING

The rent for this dwelling unit on and after July 1, 1942 can be no more than the Maximum Legal Rent entered in Section C, Item 7.

A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.

I HEREBY REPRESENT that all statements and entries given hereon are true and correct.

(Signature of Landlord or his Agent)

Dist. Ct. N D Cal.
 No. 28071-G
 J. S. Ex. 1 (Id)
 J. Calbreath, Clerk

[Endorsed] Filed July 7, 1949

UNITED STATES OF AMERICA
OFFICE OF PRICE ADMINISTRATION
REGISTRATION OF RENTAL DWELLINGS
(TYPE OR PRINT PLAINLY - DO NOT FOLD)
(Do Not Use This Form for Hotels and Rooming Houses)

AREA OFFICE
COPY

GENERAL INSTRUCTIONS

Landlord is required to register separately each rental unit, whether occupied or vacant. A dwelling unit is a group of rooms for which a single rent is paid. Complete Registration Statement in triplicate, remove carbons, and bring the three copies to the Area Rent Office. Use one in triplicate, for sections "D" & "E" if necessary. Dwelling unit was not rented at any time during the period between 1, 1942 and July 1, 1942, an application to establish the Maximum Rent must be made on Form DD-112-2.

SECTION A. MAILING ADDRESS OF LANDLORD

Landlord J.M. FINLEY
of Agent
Mail to:

J.M. FINLEY
484 OAK ST.
S.F. CALIF.

IDENTIFICATION

1. 438 LILY
Address of this rental dwelling unit
2. 1
Apartment number or location
3. Number of Rooms in this dwelling unit
4. Total Number of dwelling units in this structure

SECTION B. MAILING ADDRESS OF TENANT

Name of Tenant F. MASINO
Address 438 LILY ST.
City and State S.F. CALIF.

SECTION C. MAXIMUM LEGAL RENT

Read carefully and fill in every item which applies to this dwelling unit.

On March 1, 1942: \$ 7.00 per week () per month ()
rented on March 1, 1942, but rented at any time between January 1, 1942 and February 28, 1942.
last rented during that two-month period: _____, 1942.
on that date: \$ _____ per week () per month ()
rented at any time between January 1, 1942 and March 1, 1942, but rented before July 1, 1942.
Check one box:

- (a) Owner occupied or vacant between January 1, 1942 and March 1, 1942.
() Newly constructed without priority rating.
(c) Newly constructed with priority rating. (If checked, item 6 must also be filled in.)

first rented after March 1, 1942: _____, 1942
on that date: \$ _____ per week () per month ()
dwelling unit made available by a change which resulted in an increase or decrease in the number of dwelling units after March 1, 1942, but before July 1, 1942.

first rented after such change: _____, 1942
on that date: \$ _____ per week () per month ()
substantially changed after March 1, 1942, but before July 1, 1942. Check one box:

- (a) From unfurnished to fully furnished.
() From fully furnished to unfurnished.
(c) By a MAJOR CAPITAL IMPROVEMENT as distinguished from ordinary repair, replacement and maintenance.

first rented after such change: _____, 1942
on that date: \$ _____ per week () per month ()
dwelling unit newly constructed with a priority rating from the United States or any agency thereof.
approved by agency granting priority: \$ _____ per week () per month ()

MAXIMUM LEGAL RENT FOR THIS DWELLING UNIT IS:
\$ 7.00 per week () per month ()

Maximum Legal Rent in accordance with the following instructions:
If only one of the above items applies to this dwelling unit the Maximum Legal Rent is the rent entered for that item.
If more than one of the above items apply to this dwelling unit the Maximum Legal Rent is the rent reported for the most recent date, except in the case of Item 6.
If Item 6 applies to this dwelling unit the Maximum Legal Rent is the lower of the two rents entered in Item 3 and Item 6.
If an Administrator may at any time order a decrease in the Maximum Legal Rent determined under Items 3(a), 3(b), 4, or 5, on grounds that the rent is higher than the rent generally prevailing for comparable housing accommodations on March 1, 1942.

Section E - See Note Section C. 7 *

If Item 3(b), 4 or 5 of Section C was filled in, set forth in specific detail the type and cost of:
New construction (c) A change from unfurnished to fully furnished
A change in the number of dwelling units (d) A major capital improvement

SECTION D. EQUIPMENT AND SERVICES INCLUDED IN THE RENT ON MARCH 1, 1942

(If any one of the Items 2 to 5 of Section C apply to this dwelling unit check Equipment and Services included in the rent on the most recent date you entered in Section C.)

| 1. EQUIPMENT | Yes | No |
|--|-----|-----|
| Furniture | (X) | () |
| Running Water | (X) | () |
| Hot Water | () | (X) |
| Flush Toilet | (X) | () |
| Bathroom | (X) | () |
| Central Heating | () | (X) |
| Heating Stove | () | (X) |
| Mech. Refrigerator | () | () |
| Electricity Installed | (X) | () |
| Cooking Stove | () | () |
| If any equipment is shared, explain below: | | |

| 2. SERVICES | Yes | No |
|--------------------------|-----|-----|
| Garage | () | (X) |
| Heat or Heating Fuel | () | (X) |
| Cooking Fuel | () | () |
| Cold Water | (X) | () |
| Hot Water | () | (X) |
| Light | () | (X) |
| Ice or Refrigeration | () | (X) |
| Janitor Service | () | (X) |
| Garbage Disposal | () | () |
| Painting & Decorating | (X) | () |
| Interior Repairs | (X) | () |
| Exterior Repairs | (X) | () |
| List any other services: | | |

Are all equipment and services indicated above now included in the rent? Yes (X) No ()

WARNING

The rent for this dwelling unit on and after July 1, 1942 can be no more than the Maximum Legal Rent entered in Section C, Item 7.
A false statement on this form or an evasion or attempted evasion of the Maximum Rent Regulation may subject you to a \$5,000 fine or imprisonment for one year.
I HEREBY REPRESENT that all statements and entries given hereon are true and correct.

(Signature of Landlord or his Agent)

St. Ct. No Calif
23071-1
S. X. 2 (Id)
Calbreath, Clerk

Endorse Filed July 7, 1949



(Testimony of Edith Keil.)

The Court: Mark them 1 and 2 for identification, and then I can rule on them when the case is submitted.

(Wherefore rent registration statements previously referred to were marked Plaintiff's Exhibits No. 1 and 2 for identification.)

CERTIFICATE OF REPORTER

I, Eldon W. Rich, Official Reporter, certify that the foregoing 23 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON W. RICH.

[Endorsed]: Filed Nov. 16, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
REPORTER'S TRANSCRIPT

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the following Reporter's Transcript was filed in the above-entitled case, and is herewith forwarded to the United States Court of Appeals for the Ninth Circuit, to be considered by it as part of the Record on Appeal herein, to wit:

Reporter's Transcript for February 28, 1949.

Witness my hand and seal of the District Court of the United States for the Northern District of California, this 17th day of November, 1949.

C. W. CALBREATH,
Clerk.

[Seal] By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: Filed Nov. 17, 1949.

[Endorsed]: No. 12286. United States Court of Appeals for the Ninth Circuit. Gerald Colvin, Mrs. Rose Bories, Arthur Sandford and Genieve Sandford, Appellants, vs. Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 17, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.



No. 12286

**In the United States Court of Appeals
for the Ninth Circuit**

GERALD COLVIN, MRS. ROSE BORIES, ARTHUR SANDFORD
AND GENEVIEVE SANDFORD, APPELLANTS

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE

ED DUPREE,

General Counsel,

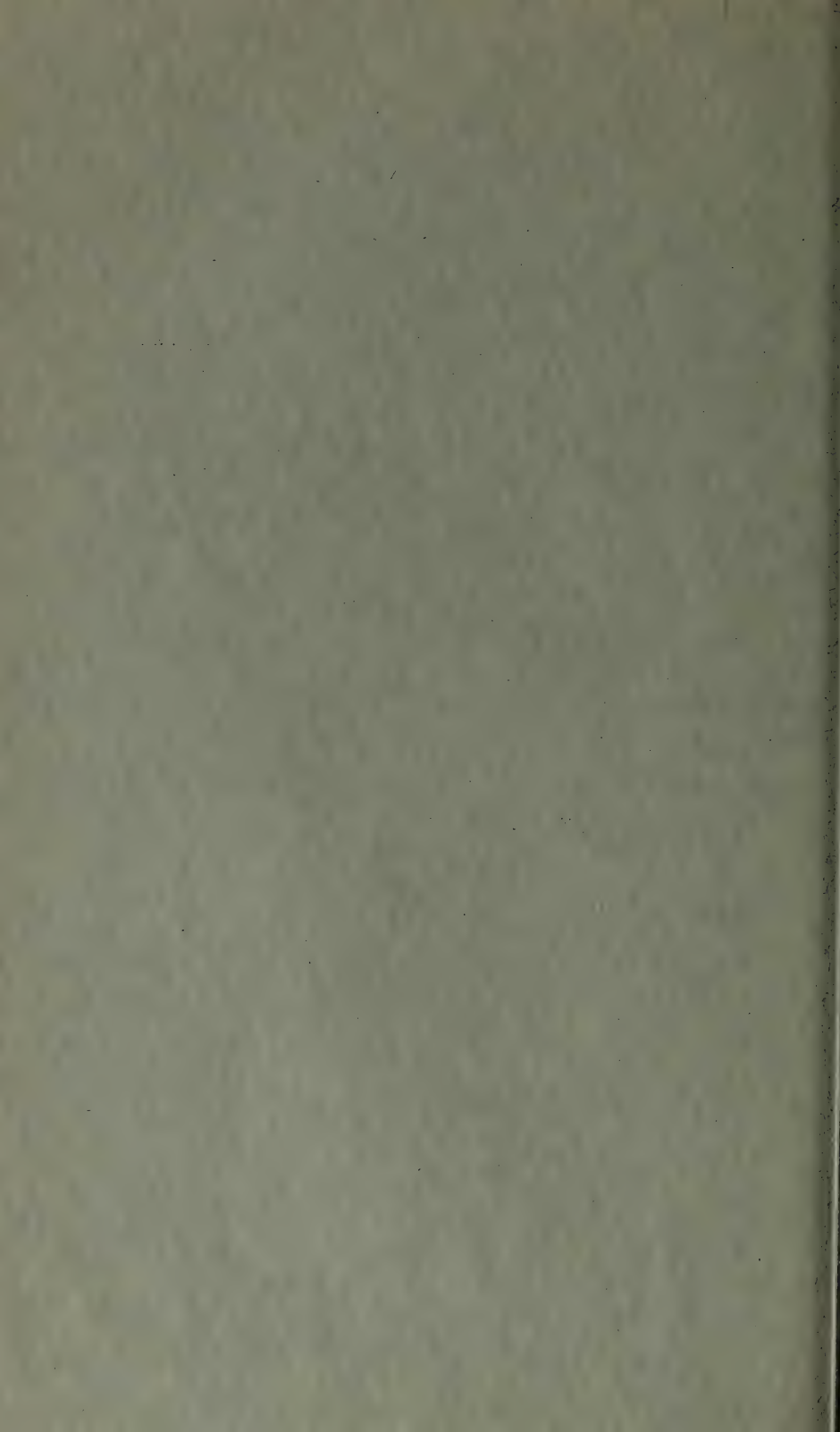
A. M. EDWARDS, Jr.,

Acting Assistant General Counsel,

WILLIAM A. MORAN,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12286

**GERALD COLVIN, MRS. ROSE BORIES, ARTHUR SANDFORD
AND GENEVIEVE SANDFORD, APPELLANTS**

v.

**TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE
HOUSING EXPEDITER, APPELLEE**

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

BRIEF FOR APPELLEE

STATEMENT OF FACTS

Appellants, defendants below, appeal from final judgment of the District Court for the Northern District of California, Southern Division (R. 17-18), in an action instituted by the Housing Expediter of the Office of the Housing Expediter for restitution of rental overcharges and injunctive relief under the provisions of the Emergency Price Control Act of 1942, as amended, the Rent Regulation for Housing (8 F. R. 7322) and the Housing and Rent Act of 1947, as amended, and the Rent Regulations issued thereunder (12 F. R. 4331) (R. 2-5).

The sole issue before the trial court was the determination of the amount of the maximum rent on the two housing accommodations involved (Supp. Rec. 30-31).

To establish the facts as to the amount of maximum rent, appellee offered in evidence two documents known and described as "Registration of Rental Dwellings" describing the housing accommodations upon which appellants were alleged to have demanded and received rentals in excess of the maximum rental permitted under the Act and the Rent Regulation for Housing issued thereunder (Supp. Rec. 48) (Plaintiffs' Exhibits 1 and 2).

Appellants stipulated that the plaintiffs' exhibits were registration statements of the housing accommodations involved and were filed with the OPA (Supp. Rec. 28) but contended that such statements do not determine or reflect the maximum rent on the premises involved. All other facts as to the payment of money by the tenants or as to the period over which this amount was paid as alleged in plaintiffs' complaint were conceded by appellants (Supp. R. 29, 30, 31).

The appellants objected to the introduction of Plaintiffs' Exhibits 1 and 2 on the ground that no proper foundation had been laid for introduction of the documents, that they are not the best evidence, and that they are hearsay as to the defendants in this action (Supp. R. 32).

The Court upon submission of this sole issue after hearing the testimony of the Rent Examiner for the Office of Housing Expediter, who had custody and control of the official records relative to the maxi-

imum rents for premises located within the San Francisco Bay Defense-Rental Area (Supp. Rec. 31-32) and arguments of counsel and after deliberation, held that defendants' objections to the admissibility of the registration statements (Plaintiffs' Exhibits 1 and 2) (R. 16-17) were not well taken; and that the proper foundation for their admission as official records of the Office of the Housing Expediter was made and their admissibility as such official records noted (R. 16). Upon the evidence contained in such records, the Court entered judgment ordering a refund to the tenants of the amount collected in excess of the maximum rent permitted and restrained and enjoined the defendants as prayed for in plaintiffs' complaint (R. 17-18).

Appellants herein contend that the District Court erred in admitting into evidence appellees' Exhibits 1 and 2 which were described and identified as the registration statements of the housing accommodations herein involved (Supp. R. 31-32) and in which was stated the maximum rent received for such premises during March 1942.

Appellants further upon this appeal contend that the admission of the registration statements into evidence was improper because:

(a) No proper foundation was laid for their introduction into evidence.

(b) They were not the best evidence.

(c) They were hearsay as against the appellants. Since the basis of this appeal is limited to this single issue, the appellee will consider the objections in the order assigned.

STATUTES

The pertinent statutes and regulations herein involved appear in the Appendix.

ARGUMENT

I

The District Court's conclusion that proper foundation as official records of the Office of the Housing Expediter was made and as such official records they were admissible evidence is a correct conclusion and statement of law

Contrary to appellants' contentions the District Court properly concluded that the registration statements (Plaintiffs' Exhibits 1 and 2) (Supp. Rec. 48) were admissible as evidence of the maximum legal rent of the housing accommodations involved herein under the Emergency Price Control Act of 1942, as amended (56 Stat. 23; 50 U. S. C. A. App. Sec. 901 et seq.) and the Housing and Rent Act of 1947 (P. L. 129, 80th Cong., 1st Sess.). Maximum rents under the Emergency Price Control Act were established by Section 4 of the Rent Regulation for Housing (8 F. R. 7322).¹ Such regulation was issued pursuant to Sections 2 (b), (c) and (d) and 201 (d) of the Emergency Price Control Act and were subsequently adopted by the Housing Expediter in the Controlled Housing Rent Regulation (12 F. R. 4331)

¹ Originally Maximum Rent Regulations 1 to 60 (F. R., Title 32, Chapter 11, Part 1388) provide:

"SECTION 4. *Maximum rents*.—Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

"(a) *Rented on maximum rent date*.—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date."

issued thereunder and pursuant to the Housing and Rent Act of 1947.

Section 7 of the Rent Regulation for Housing above cited, provided as follows:

SEC. 7. *Registration*—(a) Registration statement. On or before the date specified in Schedule A of this regulation or within 30 days after the property is first rented, whichever date is the later, every landlord of housing accommodations rented or offered for rent shall file in triplicate a written statement on the form provided therefor to be known as a registration statement. The statement shall identify each dwelling unit and specify the maximum rent provided by this regulation for such dwelling unit and shall contain such other information as the Administrator shall require. The original shall remain on file with the Administrator and he shall cause one copy to be delivered to the tenant and one copy, stamped to indicate that it is a correct copy of the original, to be returned to the landlord. In any subsequent change of tenancy the landlord shall exhibit to the new tenant his stamped copy of the registration statement, and shall obtain the tenant's signature and the date thereof, on the back of such statement. Within five days after renting to a new tenant, the landlord shall file a notice on the form provided therefor, on which he shall obtain the tenant's signature, stating that there has been a change in tenancy, that the stamped copy of the registration statement has been exhibited to the new tenant and that the rent for such accommodations is in conformity therewith.

When the maximum rent is changed by order of the Administrator, the landlord shall deliver his stamped copy of the registration statement to the area rent office for appropriate action reflecting such change.

The particular housing accommodations involved in the present appeal were located in the San Francisco Bay Defense-Rental Area wherein as provided by the aforesaid Rent Regulation for Housing, the date for filing the registration statements respecting the housing accommodations was August 15, 1942. It was in pursuance to such Regulation that the registration statements herein (Plaintiffs' Exhibits 1 and 2) were filed by the then landlord of said housing accommodations. Consideration of the contents of the quoted section of the Regulation and the constituent elements of the records and statements herein involved, impels the conclusion that the registration statements are official records of an agency of the United States encompassed by the provisions of the statutes herein cited. The character of the records, their source and origin, their printed form and contents, as well as their filing and preservation in the custody of the Administrator of the Act leave no escape from the conclusion that these were admissible as official records.

Title 28, Sec. 1733 (b), U. S. C., *Judiciary and Judicial Procedure*; Act of June 25, 1948, provides that official government records are admissible as official records of an agency of the United States. The statutory provisions provide as follows:

SECTION 1733. *Government records and papers; copies.*—

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the original thereof.

Into this category would unquestionably fall such official records as registration statements filed by landlords, orders relating to maximum rentals and other documents in the custody of the government agency charged with administering national rent control. The fact that the informative contents upon these registration statements were made by the original landlord of the premises should not detract in any manner from the official character and reliability of such records. The plain duty rested upon the landlord to state upon such records the maximum rent received by him on the maximum rent date, which in this particular instance was March 1, 1942, and every person is presumed to have performed a duty enjoined by law (Cf. *Athens Roller Mills, Inc. v. Commissioner of Internal Revenue*, 136 F. 2d 125, 128 (C. A. 6)).

Official documents (statements) required by law to be made by a nonofficial person are admissible under the exception to the hearsay rule as they are made under an official duty in the ordinary sense of duty arising from status. *Wigmore on Evidence*, 3d Ed., Vol. 5, Sec. 1633 (a), 1644, 1674 (5)).

In *Cohn v. United States* (1919), 258 F. 355, 362 (C. A. 2), in referring to the admissibility of docu-

ments required to be filed and kept on file in any of the executive departments as official records coming within the statutory provisions preceding the present provisions of the statute relied upon here, the Court with reference to the scope of such former provisions, declared :

The statute authorizes the introduction into evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this Court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is so filed and kept on file is in the opinion of the majority of the Court an official document as much so as one which was written or published by an officer in his official character or in the performance of an official duty. The word "official" is defined in the New Standard Dictionary as follows:

"1. Of or pertaining to an office or public trust; as official duties.

"2. Derived from the proper office or officer, or from the proper authority; authoritative; as an official report."

A paper which must be kept on file in a designated office and which cannot be removed therefrom pertains to that office, and so becomes official. And we are unable to see why the statute is not applicable to that class of official papers as well as to the other class. The one

class is as much within the letter of the statute as is the other, and it is also as much within the reason and spirit of the statute.

(Cf. *Oakes v. United States*, 174 U. S. 778, 796-7).

It would thus appear that regardless of who made the entry, if it was the duty of the entrant to make such entry as part of an official record and it further became the duty of the Administrator or Expediter to keep in his custody and control the document containing such entry, the document filed or entry made would be admissible as an official record. For when an officer has a duty to do in respect to a class of things recorded under his custody, then the record as such is admissible as an official document (5 *Wigmore on Evidence*, 3d Ed., Section 1639).

Such being the fact, the custody and control of the registration statements herein referred to as Plaintiffs' Exhibits 1 and 2, were kept as part of the regular course of business of the Administrator, and plaintiffs' witness, Edith Keil, as Rent Administrator of the Office of Housing Expediter (Supp. Rec. 31) had custody and control of the registration statements identifying the lower and upper flats at 438 and 440 Lily Street, San Francisco, California.

It should be unnecessary to enlarge upon or dwell to any length on the fact that the trial court was enjoined by Title 44, Section 307, U. S. C. A., to take judicial notice of the regulation requiring this registration statement to be executed and filed by such landlords subject to the Act, and requiring such statement when so filed to be kept in the custody of the Administrator of an agency of the United States.

This doctrine has a well-settled basis (*Kiyoichi Fujikawa et al. v. Sunrise Soda Water Works et al.* (C. A. 9th), 158 F. 2d 490, certiorari denied 331 U. S. 832, 67 S. Ct. 1511, rehearing denied 68 S. Ct. 31, 68 S. Ct. 352; *Caha v. United States*, 152 U. S. 211, 221-222; *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 488-89; *Thornton v. United States*, 271 U. S. 414, 420; *Tucker v. State of Texas*, 326 U. S. 519; *Yakus v. United States*, 321 U. S. 414, 435).

Appellee maintains that since Plaintiffs' Exhibits 1 and 2 (Rent Regulation Statements) were required to be executed and filed with the Administrator of the Office of Price Administration and to be kept in his custody (8 F. R. 7322), which fact was judicially noticed by the trial court (Title 44 U. S. C. A., Sec. 307), and since such official document of an agency of the United States was produced from the files of such agency and authenticated by the custodian of such files and records, a proper foundation was laid for their admission under the provisions of Title 28 U. S. C. A., Sec. 1733 (b).

In addition to the provisions of Section 1733 (b) of Title 28, U. S. C., there is a second statutory provision under which the registration statements or records concerned herein are equally admissible; namely, under Title 28, Section 1732, U. S. C., which statutory provision reads as follows:

SEC. 1732. *Record made in regular course of business.*—

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry

in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

As we have pointed out, it was the manifest duty of the Administrator to keep and preserve such official registration statements which were made in the regular course of business. It was also part of his regular course of business to do so. Since such registration statements were received by him as is evidenced by the stipulation in the record (Supp. Rec. 28) on August 10, 1942 (Supp. Rec. 48) within the time provided by the regulations for filing same, then such registration statements are admissible under Title 28, U. S. C. A., Section 1732, as coming within the exceptions to the hearsay evidence rule. To hold otherwise or to adopt the rule of evidence contended for by the defendant in the instant case would defeat the commendable purposes of the statutory provisions, which are remedial in nature and intended to facilitate the filing of evidence where death intervenes, or where there is absence or nonavailability of those persons having personal knowledge of the facts. "The objec-

tion that the certificate [of registration] is hearsay overlooks the fact that the provision of Title 28, U. S. C. A. 1732, was enacted to remove the hardships caused by the enforcement of the hearsay rule." (*Woods v. 14 Pine Street Corp.* (N. D. N. Y.), not reported (copy of opinion attached hereto, *infra* p. 29.) With reference to previous statutory provisions relating to the same subject matter, and in considering the purpose of the Act of June 20, 1936 (28 U. S. C., Section 695), it was said in *Harper v. United States*, 143 F. 2d 795, 806 (C. A. 8):

The purpose and effect of this statute is to make admissible any writing if made in the regular course of business without the strict proof of authenticity which had heretofore been required. (*Palmer v. Hoffman*, 318 U. S. 109).

And in *United States v. Schmeller*, 143 F. 2d 544, 553 (C. A. 6), the Court said in this connection:

The purpose of the enactment of Section 695 was to eliminate the technical requirements of proving the authenticity of business records and memoranda by the testimony of the maker.

Applying the rest of admissibility as defined in *New York Life Insurance Co. v. Taylor*, 147 F. 2d 297 (App. D. C.), as to the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation, there should be no difficulty in accepting as admissible in evidence such registration statements as are herein involved. And the trial court said (Supp. Rec. 40).

* * * the enforcement of this statute could be completely aborted in the case of any

property owner who formerly owned property and filed a registration statement upon the ground that if that former property owner could not be obtained, his presence could not be obtained by the OPA, in enforcing this statute, to show whether or not he actually filed this document—

Under Title 28 U. S. C. A., Section 1732 (formerly Title 28 Sec. 695), a proper foundation was laid for the admission of Plaintiffs' Exhibits 1 and 2 as being records made in the regular course of business because the regulation made it a duty for any person subject to the Act to execute and file with the Administrator such registration statements. Therefore, it was in the regular course of business that such statements were made and filed and it was the business and duty of the landlord under the regulation to make and file such statements. It was in the regular course of the Housing Expediter's business to keep such statements in the files from which they were produced and authenticated by the custodian thereof. Therefore, such records having fully met the test of admissibility, any contention that they were admitted without a proper foundation is entirely without merit. (*Palmer v. Hoffman*, 318 U. S. 109; *New York Life Insurance Co. v. Taylor*, 147 F. 2d 297 (App. D. C.); *Harper v. United States*, 143 F. 2d 795 (C. A. 8th)).

(a) *The case of Woods v. Swank*, 170 F. 2d 885 (C. A. 5) is to be distinguished from the present case.—Appellant appears to be of the opinion that the case of *Woods v. Swank*, is on all fours with the present issue and that the trial court erred in not

following this decision. There is no merit whatsoever in appellants' contention. The trial court indicated that it had carefully considered the case of *Woods v. Swank* and stated "that the case does not purport to hold that such registration statements are *per se* inadmissible, but only that the facts were insufficient to justify admission in evidence in that case." In other words, in the *Swank* case, the registration was held to be inadmissible because of an inadequate foundation, but here the court found that "The proper foundation for their admission as official records of the Office of the Housing Expediter was made" (R. 16). The Court below added that if under the authority of the *Swank* case, the statements here must be rejected, it did not feel compelled to follow the cited decision "for to do so, would * * * be contrary to Congressional intent, frustrate the just enforcement of the Price Control Act in a case where the facts require a judgment for the plaintiff." (R. 17.)

We need not here determine whether or not the *Swank* case should be followed since it is clear that the facts in that case and in the present appeal are not at all parallel or as counsel contends, on "all fours." In the *Swank* case as indicated in appellants' brief, the Area Rent Director testified that he was in charge of the files in the Area Rent Office and produced from such files a registration statement which the trial court excluded on the objection of the defendant because of the failure to prove the execution, *failure to show its date and failure to show when it came into possession of the OPA, if it did* (Appellants'

Br., pp. 2 and 3). Further, the Court of Appeals held that reference to it reveals, as the lower court found, that it is without a date and there is no stamp showing when it was filed with the OPA, if it was filed at all.

Comparing Exhibits 1 and 2 (Supp. Rec. 48A) in the present case with the exhibit in the *Swank* case, we note that these exhibits indicate that they are from the Office of Price Administration and appellants so stipulated and are marked Area Office copy numbered respectively 47817 and 47819 dated August 10, 1942, and appellee stipulated (Supp. Rec. 28) that these registration statements were filed with the OPA. The facts, therefore, in the *Swank* case certainly cannot be applied to this present appeal.

Not only is the *Swank* case contrary to the subsequent decisions by the same court in *Woods v. Tate*, 171 F. 2d 511 and *Woods v. Turk*, 171 F. 2d 244 but it is also at odds with the prior decision of the court in *Morgan v. United States*, 149 F. 2d 185 (C. A. 5), rehearing denied, cert. denied 326 U. S. 731. This was a criminal action for violations of the Emergency Price Control Act for sale of ice above the maximum legal price. The ceiling price was fixed by regulation at the highest price at which the seller sold and delivered ice during the month of March 1942. This ceiling price was evidenced by price lists filed with the local War Price and Rationing Board which were required by regulation to be filed showing thereon the ceiling price charged for ice during the month of March 1942. To establish the

fact of the ceiling price fixed for the sale of ice, the Government offered in evidence a memorandum taken from the files of the local War Price and Rationing Board where it was required to be kept by a clerk who was unable to testify of her own knowledge whether the Pure Ice and Storage Company filed the memorandum for the purpose of establishing its ceiling price. This memorandum or list was objected to on the ground that it was inadmissible for the purpose of showing the ceiling price because it failed to contain on its face evidence that it was filed by the Pure Ice and Storage Company or that the maximum prices reflected thereon were the prices charged by it for ice during March 1942. The evidence, however, showed that the memorandum was taken from the files of the War Price and Rationing Board in which were kept the ceiling prices of the various sellers in compliance with Maximum Price Regulations covering sales in March 1942. In reply to such objection, the Court held:

We think the evidence sufficiently establishes the identity of the price list and its authenticity, and the court below was correct in overruling the objection thereto. Cf. *Johnson v. United States*, 89 F. 2d 913 (C. A. 6); *Metropolitan Life Insurance Co. v. Armstrong*, 85 F. 2d 187 (C. A. 8); *Lewis v. United States*, 38 F. 2d 406 (C. A. 9).

The same result was reached in *Bowles v. Kenne-more*, 139 F. 2d 541 (C. A. 4) which was an action to enjoin violations of the Maximum Price Regulation pursuant to the Emergency Price Control Act of

1942. The complaint alleged that the defendant was engaged in supply services of cleaning, dyeing, pressing clothes, etc., and the maximum price therefor fixed by the regulation was the highest price charged by the seller in March 1942. The regulations as in the *Morgan* case provided that every person subject to the Act should prepare and keep on file a base period statement showing such prices and should file a duplicate thereof with the appropriate War Price and Rationing Board. A statement purporting to be signed by defendant was filed by the Greenville County War Price and Rationing Board and was produced from the files of the Board by the clerk who testified it was filed with her on September 10, 1942, and that it was the only basic sale statement pertaining to defendant's business on file. The clerk was unable to identify the signature appended to the statement and the defendant upon being called refused to testify on the ground that his testimony might incriminate him. Upon objection, the disputed document was excluded and the trial court dismissed the complaint. The Court of Appeals in a *per curiam* decision reversing the decision of the trial court and remanding the case held:

In the pending case the similarity of the signatures was very evident. The disputed document was produced from the office where, if genuine, it was required by law to be filed, and no motive for the falsification of the paper has been suggested. Indeed, in the absence of any denial or explanation on the part of the defendant, the conclusion that the basic period statement bears his genuine signature seems to

be irresistible. If it had been received in evidence as the act of the defendant, a prima facie case for the plaintiff would have been made out and the issuance of an injunction in the absence of any explanation or defense would have been justified. The judgment of dismissal will therefore be reversed and the case will be remanded for a new trial at which the defendant will be at liberty to present any defense which he may desire to offer (at p. 542).

The finding below that a proper foundation was laid for the admission of the registration statements is amply supported by the evidence in the case.

Plaintiff's witness identified herself as being employed by and being one of the persons having the custody and control of the official records of the Office of the Housing Expediter, San Francisco Bay Area (Supp. R. 31). She identified the Registration Statements in question as being the documents or records pertaining to and establishing the legal maximum rents for the particular rental dwelling units involved in the instant case (Supp. R. 32). She further identified said documents or records as being official records of the Office of Housing Expediter, San Francisco Bay Area. As the court below found, this testimony constituted a proper foundation for the introduction of such documents or records into evidence under the provisions of Rule 43 (a), Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c) which provides in its material part:

All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence hereto-

fore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

It is, therefore, submitted that the trial court's finding that a proper foundation for the admissibility of Plaintiffs' Exhibits 1 and 2 was correct under the provisions of Title 28 U. S. C. A., Sections 1732 and 1733 (a) and Rule 43 (a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723 (c), and should not be disturbed.

II

There is no merit in appellants' contention that the trial court violated the best-evidence rule in admitting plaintiffs' exhibits

Appellants further contend that the best-evidence rule was violated, because the best evidence of the maximum rental was the rent actually paid on the freeze date, and, instead of such evidence, reliance was placed on a registration statement filed by the original landlord.

The appellants' resort to what is termed the best-evidence rule is, to quote Wigmore,² to resort to a phrase, taken from ancient history and as stated :

² Vol. 4, *Wigmore on Evidence*, Sections 1173, 1174.

Rarely, the phrase is still invoked in odd connections, to justify some rule already established on definite and independent grounds.

And as Professor Thayer remarked:

The sooner the phrase is wholly abandoned, the better.³

In *Maloof v. United States*, 159 F. 2d 62 (1946), cert. denied 331 U. S. 818, a criminal action in which the defendant was convicted for an overcharge violation of the Rent Regulation, defendant contended upon appeal that the information upon which the conviction was based was defective in failing to allege as a fact the maximum rent established by law. In answer to this contention, this Court said:

As to the second contention: Under Sec. 11 of the said rent regulation (see F. N. 1), the maximum rent to be charged for any room, regularly rented in any defense-rental area, must be filed in the Area Rental Office. Once the maximum rent has been so filed, it cannot be changed, except by a formal order by the Area Rent Director, pursuant to Sec. 5 of the said regulation. Therefore the maximum rent of the room in question, \$2, was determined and certain under Sec. 7 of the regulation noted and so alleged in the information (at p. 64).

Thus in the *Maloof* case, *supra*, which involved a criminal case where requirements of proof are stricter than in a civil suit, this Court accepted as proof of the maximum rent for a dwelling unit, the rental therefor as registered in the Area Rent Office pursuant to Section 7 of the Rent Regulation. In view

³ *Ibid.*, Section 1173.

of the authority of the *Maloof* case, it would appear that the registration statements offered and admitted in the instant case were admissible to establish a *prima facie* case of the maximum rent for the dwelling units herein involved. In the absence of any offer of evidence by defendants to impeach the validity, genuineness, authenticity or veracity of the statements reflecting the legal maximum rent collected on the base date, the Court below was justified in giving the evidence the weight which it did. (See *Woods v. Tate*, 171 F. 2d 511 (C. A. 5th).)

It should avail little for these defendants at this date to assert ignorance of the legal maximum rent of the housing accommodation and to feel aggrieved because they were precluded from cross-examining the original landlord who in 1942 officially recorded the maximum rent received during the base period. When these defendants came into possession of the premises and lacked knowledge of the maximum rent thereon, it was incumbent upon them to consult with the proper OPA authorities for such information, in order that the rent exacted from his tenants would not be at variance with the regulation. Not having done so, for aught this record revealed, they were legally chargeable with such knowledge. (See *Woods v. Tate*, 171 F. 2d 511 (C. A. 5th.) See too, *Greider v. Woods*, No. 3861 (C. A. 10th) Nov. Term 1949, not yet reported.) Cf. *Flannagan v. United States*, 145 F. 2d 740 (C. A. 9th), holding that: One selling beef, after publication in Federal Register of regulation fixing maximum price, is charged with knowledge of the maximum price, and *Henderson v. Nixon*, 168

P. 2d 594, 66 Idaho 780, which held: Publication in the Federal Register is notice of maximum rent allowed to be charged under Emergency Price Control Act of 1942 (50 U. S. C. A. App. Sec. 902).

III

Appellants' contention that the hearsay rule was violated by the trial court is without merit

Appellants contend that Appellee's Exhibits 1 and 2 were hearsay as to these appellants, since they represent a report of a third party to a government agency as to what the rent was on a certain housing accommodation on the maximum rent date. In attempting to assert that such a report is not binding nor even admissible, appellants evidently have overlooked the fact that Appellee's Exhibits 1 and 2 were registration statements and official documents of an agency of the United States and, as such, under the provisions of Title 28, Section 1733, U. S. C. Such documents were subject to the statutory exception to the so-called hearsay rule. (See *Morgan v. United States*, 149 F. 2d 185 (C. A. 5); *Bowles v. Kennemore*, 139 F. 2d 541 (C. A. 4).)

The theory of the hearsay rule, in the opinion of this appellee, is that many possibilities and sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test of security may, in a given instance, be superfluous. It may be sufficiently clear, as in the instant case, that the statement offered is free enough from the risk of inaccuracy and untrustworthiness so that the test of

cross-examination would be a work of supererogation; or at least Congress was of that opinion in enacting Title 28, Sec. 1733, U. S. C.

No contention has been made in the present appeal that the rents, as reflected in Plaintiffs' Exhibits 1 and 2, were not the legal maximum rents under the regulation. No evidence was offered that would cast a shadow of a doubt on the authenticity of the former landlord's statement. Indeed as counsel for appellant stated to the trial court (Supp. R. 28-29):

The COURT. Well, is there any dispute as to whether this registration statement is correct or not?

Mr. FREIDENRICH. No; we do not dispute the registration statement is a registration statement. But that, in our opinion, does not determine what the maximum rent is. That is simply a report.

The COURT. Well —

Mr. FREIDENRICH. Not by the defendants in this action, you [2*] see, but by some third person.

The COURT. The registration statement was by a prior owner of the place?

Mr. FREIDENRICH. Yes, your Honor.

The COURT. Well, can't you stipulate to that, that that is so, and then leave the remaining question to be presented?

Mr. FREIDENRICH. We would stipulate that this report was filed with the old O. P. A., yes, your Honor, but we would not be able to stipulate as to whether it is correct or not. We have no way of knowing that. This is simply a re-

*Page numbering appearing at top of page of original Reporter's Transcript.

port of what the rent was on a certain date. *It might be right; it might be wrong. And we don't know anything more than that.*" [Italics supplied.]

It is presumed that every person has performed a duty enjoined by law or contract unless the contrary appears. (Cf. *Athens Roller Mills, Inc., v. Commissioner of Internal Revenue*, 136 F. 2d 125, 128 (C. A. 6th) where the court inferred the taxpayer had filed a tax return.) Nothing to the contrary having been shown, it should be presumed that the former landlord filed a timely registration statement, truly reflecting the maximum rent received by him in March 1942, and that it was kept in the custody and control of the Administrator in the performance of his duty, and that it remained there until produced in court by its custodian. Clearly, appellants did not claim it was a spurious registration statement, nor is there any proof in this case upon which to reject it. The position taken by appellants would seem to indicate that the custodian of public records would be likely to perjure himself or falsify records, "but the rule and statute reasonably presume that such will not often be the case." *Banca de Espana v. Federal Reserve Bank*, 114 F. 2d 438, 446 (C. C. A. 2d); see also, *Minnehaha County, S. D. v. Kelley*, 150 F. 2d 356, 361 (C. C. A. 8th).

Applying the principle as laid down in *Woods v. Swank*, *supra*, page 886, where the Court said:

Had plaintiff proved its (Rent Registration Statement) execution as an official memorandum or record, or that it was made in regular

course, the instrument might properly have been admissible.

Plaintiffs' Exhibits 1 and 2 were admissible.

The requirements of admissibility found lacking by the Court in the *Swank* case were unquestionably supplied in the present appeal. The registration statements, Exhibits 1 and 2, bear the date of August 10, 1942, the identifying file numbers of the Office of Price Administration (R. 48), the stipulation by appellees that these reports were filed with the OPA (R. 28), and were duly authenticated by the custodian of such official files and records (R. 31-32). *Wigmore* 3d Ed. 2158.

(a) *The ruling of this Court in the case of Greenbaum v. United States, 80 F. 2d 113 (C. A. 9th) has no application to the single issue in this appeal.*—The cases relied upon by defendants as authority to support their contentions do not sustain them. In the case of *Greenbaum v. United States, 80 F. 2d 113 (C. C. A. 9th), (1935)* cited by defendants, the evidence there rejected by the Court in a *criminal* case involving conviction of the defendants in using the mails to defraud, were cards purportedly containing figures taken from income-tax returns of a grocery business, offered as against the defendants personally, to show the financial condition of the company. The income-tax returns from which the cards were purportedly taken were not produced, and the cards were properly rejected as evidence by the Appellate Court as a violation of the best evidence rule since the original writings or documents themselves, that is, the income-tax reports were not produced.

That the rule enunciated in that case was to be limited solely to cases involving criminal prosecutions, where income-tax returns are material evidence, is shown by this Court's ruling at p. 126:

An equally serious error committed in the reception of these cards was the inexplicable violation of the best evidence rule. The purported returns from which the cards were taken were made subject to sections 257, 1115, Revenue Act of 1926, which provides in part (26 U. S. C. A. § 1024 [26 U. S. C. A. § 55 and note]): "Returns upon which the tax has been determined by the Commissioner shall constitute public records. * * * Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary."

Treasury Regulation 74, adopted pursuant to the above statute provides (section 422): "The original income return * * * or a copy thereof, may be furnished by the Commissioner to a United States attorney for use as evidence before a United States grand jury or in litigation in any court, where the United States is interested in the result. * * *

28 U. S. C. A. § 661 provides: "Copies of any books, records, papers, or other documents in any of the executive departments * * * shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department."

The statutes have thus carefully outlined the procedure by which original returns or their certified copies may be made available in evi-

dence. Failure to follow the same is clear violation of the best evidence rule. *Corliss v. United States* (C. C. A.) 7 F. (2d) 455, 457. This court has twice indicated that the method provided is the proper one when an income-tax return is material evidence in a criminal prosecution. *Gibson v. United States* (C. A. A.) 31 F. (2d) 19, certiorari denied 279 U. S. 866, 49 S. Ct. 481, 73 L. Ed. 1004; *Lewis v. United States* (C. C. A.) 38 F. (2d) 406, 413. This procedure has also received the sanction of the Seventh Circuit in a mail fraud case. *Lewy v. United States* (C. C. A.) 29 F. (2d) 462, 464, 62 A. L. R. 388, certiorari denied 279 U. S. 850, 49 S. Ct. 346, 73 L. Ed. 993.

The *Greenbaum* case did not refer to any official regulation or return required by law to be executed but to unsigned cards purporting to contain material copied from the original tax returns. While the witness for the government testified such cards were made in his office in the regular course of business he did not know whether they were correctly transcribed from the original return. The instant case before this Court is a civil proceeding; the original documents required by law to be filed were offered in evidence; they were authenticated by their custodian having been produced from the official files where they were required by the regulation to be kept, and thus it is clearly distinguishable from *Greenbaum v. United States*, *supra*, and governed instead by the rule generally prevailing in civil cases. (See too, *Maloff v. United States*, *supra*.)

CONCLUSION

It is, therefore, respectfully submitted that the judgment of the District Court is correct and such judgment should be affirmed.

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APPENDIX

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT
OF NEW YORK

TIGHE E. WOODS, HOUSING EXPEDITER OFFICE OF THE
HOUSING EXPEDITER, PLAINTIFF

vs.

14 PINE STREET CORPORATION, DEFENDANT

MEMORANDUM

The decision in this action requires no extended discussion since the defendant offered no proof to controvert the evidence of the plaintiff, which taken together with the admissions available under the provisions of Rule 36 of the Rules of Civil Procedure, amply support the findings made herein.

As I understand the defendant's position, he relies upon his objection to the admissibility of the certificate of registration, and contends that plaintiff has, therefore, failed to make out a claim upon which relief may be granted. I see no force in its objection to the admissibility of the certificate. The defendant has failed to answer plaintiff's requests for admission, one of which refers to the authenticity of the registration certificate. The objection that the certificate is hearsay overlooks the fact that the provision of Title 28 U. S. C. A. 1732 was enacted to remove the hardships caused by the enforcement of the hearsay rule (*Palmer vs. Hoffman*, 318 U. S. 109). It would

also seem that the defendant must have adopted the registration certificate as filed by his predecessor owner; otherwise; he is in a position of having filed no certificate for the premises in question, and no maximum rental has been placed thereon.

Defendant's motions are considered denied.

Judgment may be entered in accordance herewith.

STEPHEN W. BRENNAN,

U. S. D. J.

No. 12287

United States
Court of Appeals
For the Ninth Circuit.

W. L. CASEY and AGNES CASEY,
Appellants,
vs.

R. MAX ETTER and WILLIAM E. CULLEN,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.

FILED

AUG 31 1949

PAUL P. O'BRIEN,
CLERK



No. 12287

**United States
Court of Appeals**

For the Ninth Circuit.

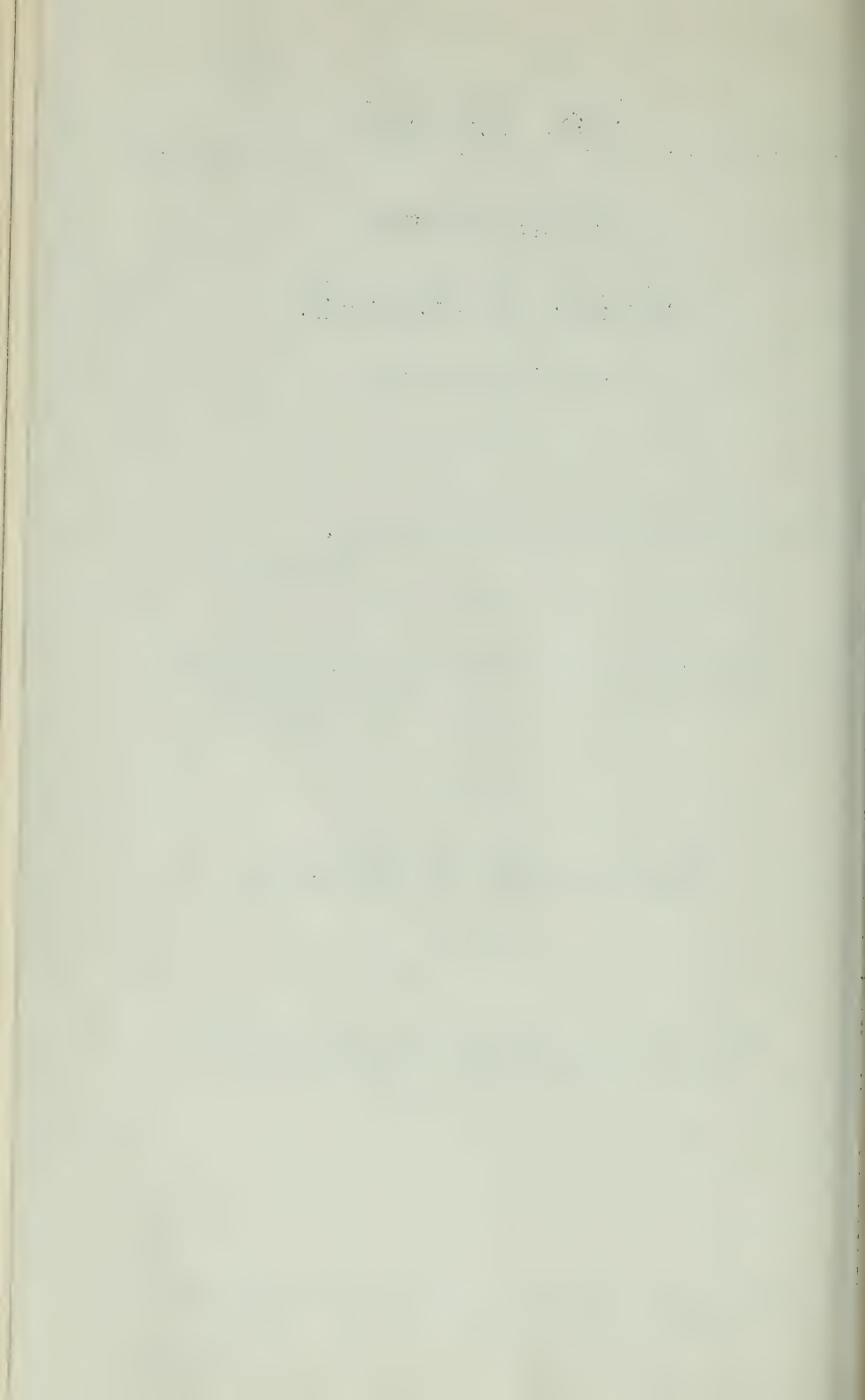
W. L. CASEY and AGNES CASEY,
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VS.

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Appellee.

Transcript of Record

**Upon Appeal from the United States District Court
for the District of Idaho, Northern Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein printing in italic the two words between which the omission seems to occur.]

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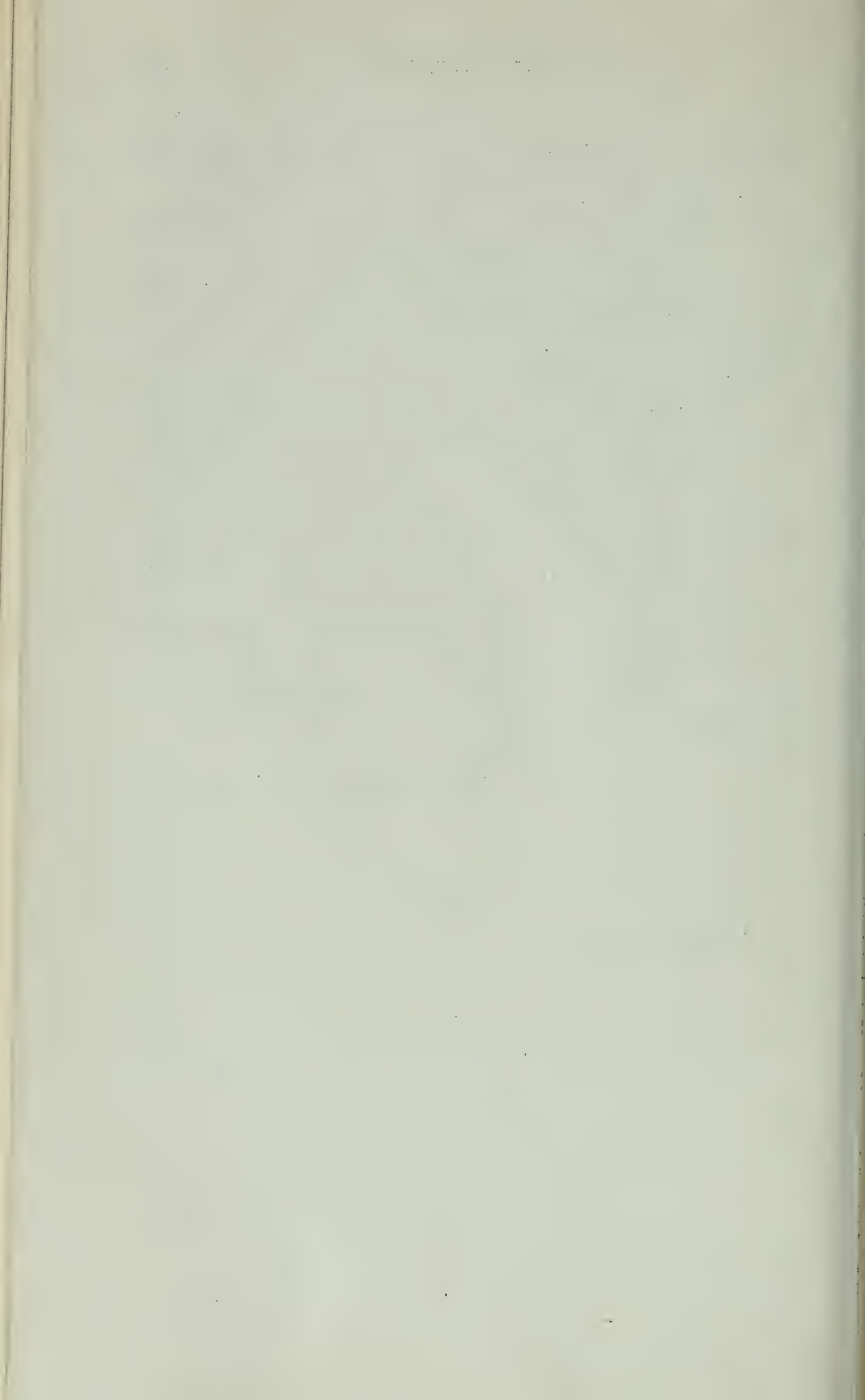
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Attorneys for the Defendants.

In the District Court of the United States for the
District of Idaho, Northern Division

No. 1720

R. MAX ETTER and WILLIAM E. CULLEN,
Plaintiffs,

vs.

W. L. CASEY and MRS. JANE DOE CASEY,
Whose True Christian Name Is Unknown, His
Wife,

Defendants.

COMPLAINT

Come now the plaintiffs and for cause of action
allege as follows:

I.

The jurisdiction of this court is founded upon
diversity of citizenship and the amount involved.

(a) The plaintiffs are citizens and residents of
the State of Washington.

(b) The defendants are citizens and residents of
the State of Idaho.

(c) The matters in controversy exceed \$3,000.00,
exclusive of interest and costs.

II.

That the plaintiffs and each of them are and were
at all times hereinafter mentioned attorneys at law,
authorized and licensed to practice law before the
Supreme Court and the inferior courts in the State
of Washington.

III.

That at all times hereinafter mentioned the defendants, W. L. Casey and Mrs. Jane Doe Casey, whose true Christian name is unknown, were and are husband and wife, and the obligation hereafter referred to was created in the State of Washington and is the obligation of each of the defendants and the marital community composed of the said defendants herein.

IV.

That on or about February 13, 1948, the defendants employed the plaintiffs as attorneys-at-law to perform legal services for and on behalf of the defendants, and each of them, and the community composed of the defendants.

The plaintiffs were so employed for the purpose of collecting monies owed to the defendants by others in an amount approximating \$75,000.00; and the defendants, at that time and pursuant to said employment, agreed to pay to the plaintiffs reasonable attorneys' fees for services to be performed.

V.

In pursuance of said contract of employment the plaintiffs did advise, consult with, and represent the defendants' interests in respect of the collection of said monies, and that under and pursuant to said employment, and at the instance and request of the defendants, and for their benefit, the plaintiffs negotiated recommended, framed and supervised certain contracts, instruments and proceedings and did analyze and recommend, advise and perform other

valuable services for and on behalf of the defendants, between February 13, 1948, and June 14, 1948, to the effect and with the result that the defendants received from the claims in controversy, and in settlement thereof, a sum of approximately \$60,000.00.

VI.

During the course of said employment, and for the special use and benefits of the defendants, and in order to carry out the contract of employment, the plaintiffs expended and advanced the sum of \$39.14 in office expenses, long distance telephone calls and travel, and that the said sums were reasonable and necessary to the performance of said contract of employment.

VII.

The plaintiffs, as such attorneys and counselors, spent many days of time in working both in and out of their offices at Spokane, Washington, in the performance of said contract of employment; and, solely as a result of their services, efforts and advice, the defendants received a great pecuniary value, to wit, not less than \$60,000.00, and that the services so as aforesaid rendered by the plaintiffs to the defendants at their special instance and request, were and are of the reasonable value of \$15,000.00, no part of which has been paid by the defendants to the plaintiffs, and the sum of \$39.14 for monies laid out and expended by the plaintiffs for the defendants.

VIII.

Although the defendants have acknowledged the

services of the plaintiffs and have promised to pay to the plaintiffs a reasonable and proper sum therefor, said defendants have failed and refused to pay the same, although demand has been made therefor.

Wherefore, plaintiffs pray that the court enter judgment herein in favor of the plaintiffs and against the defendants, and each of them, and the community composed of the defendants, in the sum of Fifteen Thousand Thirty-nine Dollars and fourteen cents (\$15,039.14) and for their costs and disbursements herein incurred and expended.

/s/ WILLIAM S. HAWKINS,

/s/ R. MAX ETTER,

/s/ WILLIAM E. CULLEN,

Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 21, 1948.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 15, 1948

Comes now counsel for the defendants and moves the Court for permission to withdraw his Motion to Dismiss and for Security of Costs. The Court, being advised in the premises, it was so ordered.

Whereupon, the Court announced that the Motion to make more definite, and for a Bill of Particulars will be denied without prejudice, and the defendant will be given three days to answer; and that 10 o'clock a.m., on Tuesday, November 23, 1948, is fixed for the trial of this cause before a jury.

Nov. 15, 1948.

[Title of District Court and Cause.]

ANSWER

Come now W. L. Casey and Agnes Casey, and for answer to the complaint of the plaintiffs herein, admit, deny, and allege as follows:

1. Admit the allegations of Paragraph I thereof.
2. Admit the allegations of Paragraph II thereof.
3. These answering defendants have no knowledge or information on which to form a belief with respect to the allegations of Paragraph III thereof, and therefore deny the same.
4. Deny each and every allegation, matter and thing contained in Paragraph IV thereof.
5. Deny each and every allegation, matter and thing contained in Paragraph V thereof.
6. Deny each and every allegation, matter and thing contained in Paragraph VI thereof, and particularly deny that the plaintiffs expended the sum of \$39.14 or any other sum for or on behalf of or at the instance and request of defendants or in pursuance of any contract of employment between defendants and plaintiffs.
7. Deny each and every allegation, matter and thing contained in Paragraph VII thereof and particularly deny that the defendants received \$60,000.00 or any other sum as a result of any services

rendered to them by plaintiffs, or that the sum of \$15,000.00 or any other sum or value of any services was rendered to them or on their behalf or at their instance and request, or that the plaintiffs laid out or expended the sum of \$39.14 or any other sum for and on behalf of defendants or at their request.

8. Deny each and every allegation, matter and thing contained in Paragraph VIII thereof except defendants admit that they refuse to pay the demand of this complaint or any other demand made by plaintiffs arising out of any alleged contract of employment between plaintiffs and these defendants.

And as an Affirmative Defense, defendants allege that the relationship of attorney and client has never and does not now exist between the plaintiffs herein and these defendants.

Wherefore having fully answered plaintiffs' complaint, defendants pray that they take nothing thereby; that the same be dismissed, and that the defendants be given judgment for their costs and disbursements herein expended.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Defendants.

Duly verified.

Service acknowledged Nov. 17, 1948.

[Endorsed]: Filed Nov. 18, 1948.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 23, 1948

This cause came on for trial before the Court and a jury, Messrs. Wm. S. Hawkins, Max Etter and Wm. Cullen appearing as counsel for the plaintiffs, and Messrs. W. J. Nixon and George W. Young appearing as counsel for the defendants, who were also present.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. F. E. Vinion, whose name was so called, was excused for cause.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to wit:

| | |
|--------------------|-------------------|
| O. L. Jones | Lee Carlock |
| Geo. H. Sonnichsen | Geo. H. Alexander |
| Earl Sheffler | Abe Irish |
| Wm. H. Frederic | Harold V. Wilson |
| Theo. L. Merkel | Basil Gooby |
| Alice A. Runsen | Wm. Neu |

The Court directed that one juror, in addition to the panel, be called to sit as an alternate juror. Thereupon, the name of F. Dan O'Connell was

drawn from the jury box, and, on being sworn and examined on voir dire, was found duly qualified, and was accepted by counsel for the respective parties.

The jury panel and the alternate juror were sworn to well and truly try the cause at issue and a true verdict render.

After a statement of plaintiffs' cause by their counsel, Wm. Cullen, R. Max Etter, Frank H. Davis, Albert Kunholtz, Edward N. Leehan were sworn and examined as witnesses, and other evidence was introduced on the part of the plaintiffs, and here plaintiffs rest.

Comes now counsel for defendants and moves the Court for a directed verdict for defendants or in the alternative for an order of judgment of non suit. The Court being advised in the premises, denied the motion.

After admonishing the jury, the Court excused them to 10 o'clock a.m., on Wednesday, the 24th day of November, 1948, and further trial of the cause was continued to that time.

Nov. 23, 1948.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 24, 1948

This cause came on for further trial before the Court and jury, counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

Whereupon, H. J. Adams, Sherm. Beggerstaff, C. W. King, Robert S. King, and W. L. Casey, were sworn and examined as witnesses on the part of the defendants, and here the defendants rest, and here both sides close.

Comes now counsel for defendants and renews their motion for a directed verdict for defendants or in the alternative for a judgment of non suit or dismissal. After hearing respective counsel, the Court announced that the item of \$39.14 will be eliminated and the jury instructed accordingly, otherwise the motion will be overruled.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury. The Court discharged the alternate juror, and the jury panel retired in charge of a bailiff, duly sworn, to consider of their verdict.

On the same day the jury returned into court, counsel for the respective parties being present; whereupon, the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the Jury in the above-entitled cause, find for the plaintiffs, and assess damages against the defendants in the sum of \$ Four Thousand and no/100.

/s/ “O. L. JONES,
“Foreman.”

The verdict was recorded in the presence of the

jury, and then read to them, and they each confirmed the same.

Nov. 24, 1948.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find for the plaintiffs, and assess damages against the defendants in the sum of \$ Four Thousand and no/100.

/s/ O. R. JONES,
Foreman.

[Endorsed]: Filed Nov. 24, 1948.

In the District Court of the United States for the
District of Idaho, Northern Division

No. 1720

R. MAX ETTER and WILLIAM E. CULLEN,
Plaintiffs,

vs.

W. L. CASEY, and MRS. JANE DOE CASEY,
Whose True Christian Name Is Unknown, His
Wife,

Defendants.

JUDGMENT

This cause came on for trial before the Court and a jury on November 23, 1948, et seq., both parties

appearing by counsel, and the issues having been duly tried and the jury having rendered a verdict for plaintiffs in the sum of Four Thousand Dollars (\$4,000.00),

It Is Hereby Ordered, Adjudged and Decreed That plaintiffs recover of defendants the sum of \$4,000.00, with interest at the rate of 6% per annum from the date of Judgment, and their costs in the amount of \$60.88, and that plaintiffs have execution therefor.

Dated at Coeur d'Alene, Idaho, this 24th day of November, 1948.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Endorsed]: Filed Nov. 24, 1948.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT N.O.V. OR IN THE
ALTERNATIVE FOR A NEW TRIAL

Come now the above-named defendants and move the Court for a judgment and/or order setting aside the judgment entered herein on the verdict of the jury, and for a judgment in conformity with defendants' motion for a directed verdict made at the conclusion of the plaintiffs' case and at the end of the taking of all testimony in this case.

In the event that the foregoing motion is denied, and in that event only, then come the defendants and represent to this Honorable Court that on the 24th day of November, 1948, a judgment was entered

herein in favor of the plaintiffs directing defendants to pay the sum of \$4,000.00 together with costs taxed herein, to the plaintiffs; that since the entry of the judgment aforesaid the defendants have discovered certain new evidence of which theretofore they had no knowledge or means of knowledge; that the said new evidence consists in proof of the following pertinent facts which would changed the result:

1. That the defendants did not contract with the plaintiffs whereby the relationship of attorney and client was to or did exist between them.

2. That the plaintiffs were employed by the Sulphur Springs Gypsum Company and certain individuals not including the defendants, to represent them with respect to claims which they had against H. J. Adams.

3. That Frank Bush, acting as the president of the Sulphur Springs Gypsum Company, requested plaintiff, Etter, to go to Billings to complete the transfer of the assets of the Sulphur Springs Gypsum Company to the new buyer and to receive from the new buyer moneys due those whom plaintiffs were representing.

4. That the letter written to Linder was secured to be done by the Sulphur Springs Gypsum Company and not by the defendants.

5. That the letter written to the Billings newspaper was written at the request of the Sulphur

Springs Gypsum Company and not by the defendants.

6. That it was orally agreed between plaintiffs and certain stockholders of the Sulphur Springs Gypsum Company that they would represent them, agree to look to H. J. Adams for their fee in the amount of \$4,000.00 but that if Adams failed to pay them their fee of \$4,000.00 they would look to the individuals employing them for their fee.

7. That by subsequent agreement the plaintiffs fixed their fee by charging and collecting from Frank Bush \$1700.00 and Kienholz \$1300.00, and the remainder of the stockholders whom they represented they fixed their fee at one half of the interest paid such stockholders, at the rate of 6% per annum on their investments.

8. That the obligation to pay attorneys fees as originally agreed, ran from Adams to the plaintiffs, with an understanding that those who contracted with Adams as disclosed in Exhibit 15 would pay in the event plaintiffs failed to collect from Adams.

That all of such facts would be testified to by Frank Bush as appears from his affidavit attached hereto.

That said motion for new trial is based upon the following further grounds:

For error of law in ruling upon relevant testimony, refusing to admit the same, which testimony would have established that the plaintiffs fixed their fee by limiting the extent thereof to an amount equal to one half of accrued interest at the rate of

six per cent per annum on claims handled by them in the same transaction.

For errors in the admission of evidence consisting of exhibits which were prejudicial to the defendants, and over their objection.

Wherefore defendants pray that the motion for judgment N.O.V. be granted, or in the alternative that their motion for new trial be granted and that they be given opportunity to present the new evidence as aforesaid.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Defendants.

I certified that a copy of the Foregoing Motion for Judgment N.O.V. or in the Alternative for a New Trial and attached affidavit of W. L. Casey, was mailed to W. S. Hawkins, 320 Wiggett Bldg., Coeur d'Alene, Idaho, on December 4, 1948.

/s/ GEO. W. YOUNG.

Service Acknowledged Dec. 4. 1948.

[Endorsed]: Filed Dec. 8, 1948.

[Title of District Court and Cause.]

AFFIDAVIT OF W. L. CASEY

W. L. Casey, being first duly sworn, upon oath deposes and says: That he is one of the parties to the above entitled action. That the above entitled case was set for trial on November 15th for trial to be had on November 23rd. That he was away

from his home in Bonners Ferry, Idaho, and was not located by his attorneys until late in the evening of November 15th. That he was away from his home, being at Spokane, Washington. That he was convalescing from sickness at the home of his sister, May Loihel at East 2937 Central Avenue in the City of Spokane. That your affiant is and was suffering from a chronic heart ailment; that he was unable to leave immediately for Bonners Ferry, where he kept his records. That he was unable to secure the whereabouts of Frank Bush, whose affidavit is attached to the motion for a new trial herein, prior to the time of trial so as to enable him to secure his testimony either by deposition or to have said witness personally in Court. That by the exercise of due diligence he could not have avoided the situation with which he is presently confronted, to-wit: that of having available the testimony of the witness Bush, whose testimony would have, in his opinion, changed the result in this case.

That H. J. Adams was not indebted to your affiant personally.

Further affiant saith not.

/s/ W. L. CASEY.

Subscribed and sworn to before me this 30th day of November, 1948.

[Seal] /s/ GEO. W. YOUNG,
Notary Public in and for the State of Washington,
residing in Spokane.

Service Acknowledged Dec. 4, 1948.

[Endorsed]: Filed Dec. 8, 1948.

[Title of District Court and Cause.]

MOTION TO STRIKE

Comes now the above named plaintiffs, through their attorneys, and move the Court for an order striking from the files herein defendants' motions for stay of execution and motion for judgment N.O.V. or in the alternative for a new trial, and to strike further from the files the affidavit of W. L. Casey set forth in support of defendants' said motion for judgment N.O.V. or in the alternative for a new trial, on the following grounds, to-wit:

(1). That the motions filed by the defendants herein are not timely and have not been filed within the ten-day period provided by the rule in such cases, to-wit, Rule 59 (b) of the Federal Rules of Civil Procedure;

(2). On the ground and for the reason that the affidavit of W. L. Casey, defendant herein, does not show that there has been an exercise by the said W. L. Casey, defendant, of due diligence and, for the further reason, that the said motion of defendants herein and the affidavit of W. L. Casey is not supported by the affidavit of any new witness that said witness will give the testimony set out in the motion or in the said affidavit of W. L. Casey (Rules of Idaho District Court, Rule #22);

(3). In the motion for judgment N.O.V. or in the alternative for a new trial and in the affidavit of W. L. Casey, reference is made to the affidavit of one Frank Bush (whose true name is Frank

Busch); that said affidavit of Frank Busch has not been filed with the Clerk of the above entitled Court; that in the absence of such an affidavit there has not been presented to this Court any affidavit of any new witness reciting or outlining the testimony of said new witness or stating that he would testify to the same in the event of a new trial; and, that, therefore, said motion wholly fails to recite any reason why a new trial should be granted;

(4). That in the affidavit of W. L. Casey he merely states:

“That he was unable to secure the whereabouts of Frank Bush, whose affidavit is attached to the motion for a new trial herein, prior to the time of trial so as to enable him to secure his testimony either by deposition or to have said witness personally in Court. That by the exercise of due diligence he could not have avoided the situation with which he is presently confronted, to-wit, that of having available the testimony of the witness, Bush, —.”

But said affidavit does not set out any facts and circumstances showing the exercise of any diligence, nor does it show what effort, if any, was made by W. L. Casey to secure the testimony or deposition of the said Frank Busch;

(5). That said defendant, through his counsel, has already presented to this Court, in Chambers and in Open Court, during the progress of this trial, his objections and motions directed to the admissibility of certain evidence and exhibits, which objec-

tions have been fully and fairly presented, argued and overruled;

(6). That no offer of proof was made during the course of the trial and, therefore, no error of law was committed in refusing to admit any testimony which "would have established that the plaintiffs fixed their fees by limiting the extent thereof to an amount equal to one-half of accrued interest at the rate of six per cent per annum on claims handled by them in the same transaction," and, had such an offer been made, the same would not have been appropriate or admissible and would have been irrelevant and immaterial to the issues at hand; and,

(7). That at the time the above entitled cause was set for trial, to-wit, November 16th, 1948, no application was made for continuance upon the ground of the absence of any witness or witnesses, no application or motion was made for the vacating of the setting at that time, or at any time from then to the date of the trial, to-wit, November 23rd, 1948 and that at the time of the commencement of said trial the defendants and their proofs were ready for trial and did thereafter proceed to trial without any objections.

This Motion is based upon the records and files of this action, the minutes of the Clerk of the Court, the reporter's stenographic notes, the affidavits of R. Max Etter and William E. Cullen hereto attached, and all other matters of record herein.

Dated, this 18th day of December, 1948.

/s/ WM. S. HAWKINS,
Attorney for Plaintiffs.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM E. CULLEN

State of Washington,
County of Spokane—ss.

William E. Cullen, being first duly sworn, on oath deposes and says: That he is one of the parties to the above-entitled action; that after the above-entitled case was set for trial, and prior to the trial thereof, to-wit, on the 16th day of November, 1948, your affiant called Frank P. Busch's home at Colton, Washington, and was advised upon said call to get in touch with Frank P. Busch, at 4218 North Second Place, Phoenix, Arizona; that thereupon your affiant put in a long-distance telephone call to the said Frank P. Busch at the said address; that he did not actually talk to Frank P. Busch, but that Mr. Etter, another party to this action, did talk to him, at about 5:00 o'clock P.M. on Tuesday, November 16th.

That in the Motion for Judgment N.O.V. or in the Alternative for a New Trial by the defendants herein, your affiant, after examining said Motion, is informed that the Affidavit of Frank P. Busch mentioned therein is not on file in the said case; that this is presumably left out of the filings because the same was not signed; that in this connection your affiant has the following to state:

That in the evening of Wednesday, December 1, 1948, at about 7:30 o'clock P.M., the said Frank P. Busch telephoned from Phoenix, Arizona, at his own expense, to your affiant, and conversed with him

concerning the above case; that at that time the said Frank P. Busch said that W. L. Casey had forwarded an affidavit to Frank P. Busch, and that the said Frank P. Busch was not going to sign it and was going "to throw it into the waste basket"; that thereafter, and on the 7th day of December, 1948, your affiant was in his office, at 726 Paulsen Building, Spokane, Washington, when the following telegram was received, addressed to Max Etter: "Have not signed any affidavit in case of Etter and Cullen versus W. T. Casey in Federal Court in Idaho. /s/ Frank Busch."

That all during the negotiations with defendant Casey and others mentioned during this lawsuit, it was the custom of your affiant and R. Max Etter to call the said Frank P. Busch by long-distance telephone at his home in Colton, Washington; that the first time your affiant called the said Frank P. Busch, he first called the office of Mr. W. L. Casey in Spokane, Washington, and was there informed where Mr. Busch lived and was there given instructions on how to reach the said Busch by telephone; that your affiant followed said directions and that said defendant W. L. Casey has at all times prior to this said trial had the means of reaching and talking to said Frank P. Busch.

/s/ WILLIAM E. CULLEN.

Subscribed and sworn to before me this 13th day of December, 1948.

[Seal] /s/ ROY A. REDFIELD,
Notary Public in and for the State of Washington,
residing at Spokane therein.

[Title of District Court and Cause.]

AFFIDAVIT OF R. MAX ETTER

State of Washington,
County of Spokane—ss.

R. Max Etter, being first duly sworn, on oath depose and say: That I am one of the parties to the above-entitled action, and that immediately after said case was set for trial by the Honorable Chase A. Clark, United States District Judge, and prior to the trial of said case, to-wit, on the 16th day of November, 1948, I talked by telephone with Frank P. Busch, who at said time was residing at 4218 North Second Place, Phoenix, Arizona; that I told the said Frank P. Busch that the above action was coming on for trial and I asked the said Frank P. Busch if he would be in a position to testify thereat; that the said Frank P. Busch informed me that he felt it was wholly unnecessary for him to testify in the above-entitled case because of the fact that he would testify substantially the same as one Albert W. Kienholz and Frank H. Davis, two of plaintiffs' witnesses who testified at the trial had in the District Court of Idaho in the above-entitled cause. I further state, that in view of my conversation with the said Frank P. Busch, I was, and still am of the opinion that the testimony of the said Frank P. Busch would be cumulative as concerns the testimony given heretofore in the above cause by the said witnesses, Albert W. Kienholz and Frank H. Davis.

That your affiant is further informed that the said motions heretofore filed by the defendants in this cause are not supported by the Affidavit of Frank P. Busch, to which reference is made in said motions, and in this connection I have the following to state: that on the morning of December 6, 1948, I talked with the said Frank P. Busch, by long-distance telephone at Phoenix, Arizona, and the said Frank P. Busch stated to me that he had not signed any affidavit for or on behalf of the defendant, W. L. Casey, or in support of any legal proceedings or motions then being undertaken by the said W. L. Casey, and furthermore stated that he did not intend to sign any affidavit in respect thereto; that in reply to my request to the said Frank P. Busch to confirm such conversation, the said Frank P. Busch sent a telegram to me at my office at 726 Paulsen Building, Spokane, Washington, which telegram stated as follows: "Have not signed any affidavit in case of Etter and Cullen versus W. T. Casey in Federal Court in Idaho. /s/ Frank Busch."

That, likewise, at the time that said above-entitled cause was set for trial, no objection was made thereto by defendants' counsel on the ground that certain testimony or evidence was not available to said defendants at the time of trial; that, furthermore, no request or motion for continuance was made at any time by the said defendants in the above-entitled cause, either on the day that said cause was set for trial, nor on the day said cause was tried,

and defendants stated in open court that they were ready for trial.

/s/ R. MAX ETTER.

Subscribed and sworn to before me this 15th day of December, 1948.

[Seal] /s/ GERALD R. O'MELVENY,
Notary Public in and for the State of Washington,
residing at Spokane therein.

[Endorsed]: Filed Dec. 18, 1948.

[Title of District Court and Cause.]

MINUTES OF THE COURT

April 18, 1949

This cause came on regularly this date in open Court on defendants' Motion for a directed verdict or in the alternative for a new trial; William S. Hawkins, Esquire, representing the plaintiffs and Messrs. George S. Young and W. J. Nixon representing the defendants.

After hearing respective counsel, the Court announced the Motion for Judgment N.O.V. or in the alternative for a new trial is denied.

April 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that W. L. Casey and Jane Doe Casey, whose true Christian name is Agnes Casey, his wife, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 24, 1948.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants W. L. Casey and Agnes Casey, his wife.

[Endorsed]: Filed April 25, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents: That we, W. L. Casey and Agnes Casey, husband and wife, as principals, and Saint Paul-Mercury Indemnity Company, organized and existing under the laws of the State of Delaware, as sureties, are held and firmly bound unto the plaintiffs herein in the full and just sum of Eight Thousand One Hundred Twenty One and 76/100 Dollars (\$8,121.76) to be paid to the said plaintiffs or their executors, administrators, or assigns; to which payment, well and

truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of April, in the year of our Lord One Thousand Nine Hundred and Forty-Nine.

Whereas lately at a District Court of the United States for the District of Idaho, Northern Division, in a suit depending in said Court, between R. Max Etter and William E. Cullen, Plaintiffs, vs. W. L. Casey and Mrs. Jane Doe Casey, whose true Christian name is Agnes Casey, his wife, Defendants, a judgment was rendered against the said defendants, and the said defendants having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit, on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California, or any other place where such court may sit and call this case on for hearing.

Now, the condition of the above obligation is such, that if the said principals, W. L. Casey and Agnes Casey, shall pay to R. Max Etter and William E. Cullen, the plaintiffs above named, all costs and damages that shall be adjudged against them on the appeal and shall satisfy and perform the judgment appealed from in case it shall be affirmed, and any judgment or order which the said Circuit Court of Appeals may render or order to be rendered by said

United States District Court for the District of Idaho, Northern Division, not exceeding in amount the above named original judgment, then this obligation to be void; otherwise to be and remain in full force and effect.

/s/ W. L. CASEY,

/s/ AGNES CASEY,

Principals.

SAINT PAUL-MERCURY

INDEMNITY COMPANY,

Surety,

/s/ W. J. RILEY,

Attorney-in-fact.

[Seal]

Approved:

/s/ CHASE A. CLARK,

U. S. District Judge.

Countersigned:

/s/ GEO. C. WALKER,

Resident Agent,

Boise, Idaho.

CERTIFIED COPY OF POWER
OF ATTORNEY

Original on File at Home Office of Company. See fourth line of certification hereof.

Saint Paul-Mercury Indemnity Company

Home Office: Saint Paul, Minnesota

Know All Men By These Presents: That the Saint Paul-Mercury Indemnity Company, a corpo-

ration organized and existing under the laws of the State of Delaware, and having its principal office in the City of Saint Paul, Minnesota, does hereby constitute and appoint W. J. Riley, 1124 Paulsen Bldg., Spokane, Washington, its true and lawful attorney(s)-in-fact to execute, seal and deliver for and on its behalf as surety:

Any and all bonds and undertakings not exceeding in penalty the sum of One Hundred Thousand and no/100 Dollars (\$100,000.00) each, and the execution of such instrument(s) in pursuance of these presents, shall be as binding upon the said Saint Paul-Mercury Indemnity Company, as fully and amply, to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office.

This Power of Attorney is executed, and may be certified to and may be revoked, pursuant to and by authority of Article VI,—Section 6-F, of the By-Laws adopted by the Board of Directors of the Saint Paul-Mercury Indemnity Company at a meeting called and held on the 24th day of October, 1936, of which the following is a true transcript of said Section 6-F:

“The President or any Vice President or Secretary shall have power and authority:

(1) To appoint Attorneys-in-fact, and to authorize them to execute on behalf of the Company, and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and

(2) To appoint Special Attorneys-in-fact who are hereby authorized to certify to copies of any power-of-attorney issued in pursuance to this section and/or any of the By-Laws of the Company, and

(3) To remove, at any time, any such Attorney-in-fact or Special Attorney-in-fact and revoke the authority given him.”

In Testimony Whereof, the Saint Paul-Mercury Indemnity Company, has caused this instrument to be signed and its corporate seal to be affixed by its authorized officer this 12th day of February, 1948.

SAINT PAUL-MERCURY
INDEMNITY COMPANY.

[Corporate Seal]: /s/ M. D. PRICE,
Vice President.

State of Minnesota,
County of Ramsey—ss.

On this 12th day of February, 1948, before me came the individual who executed the preceeding instrument, to me known, and, being by me duly sworn, said that he is the therein described and authorized officer of the Saint Paul-Mercury Indemnity Company; that the seal affixed to said instrument is the Corporate seal of said Company; that the said Corporate Seal and his signature were duly affixed by order of the Board of Directors of said Company.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal, at the City of

Saint Paul, Minnesota, the day and year first above written.

[Seal]: /s/ C. L. JAEGER,
Notary Public, Ramsey County, Minn.
My Commission Expires June 2, 1953.

CERTIFICATION

I, the undersigned, a Special Attorney-in-fact of the Saint Paul-Mercury Indemnity Company, duly appointed pursuant to and by authority of Section 6-F (2) of Article VI of the By-Laws of said Company, adopted on the 24th day of October, 1936, do hereby certify that I have compared the foregoing copy of the Power of Attorney and affidavit, and the copy of Section 6-F of Article VI of the By-Laws of said Company as set forth in said Power of Attorney, with the Originals On File In The Home Office Of Said Company, and that the same are correct transcripts thereof, and of the whole of the said originals, and that the said Power of Attorney has not been revoked and is now in full force and effect.

In Testimony Whereof, I have hereunto set my hand this day of 19...

/s/ D. B. NIKSCH,
Special Attorney-in-fact.

[Endorsed]: Filed April 25, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER RULE 19

Come now the above named appellants and file their statement of points on which they will rely on appeal.

1. That the Court erred in admitting Exhibits 1 to 5 inclusive for the stated purpose of showing the amount of labor and services performed by the plaintiffs.

2. That the Court erred in denying appellants' motion for a directed verdict made at the conclusion of plaintiffs' case.

3. That the Court erred in failing to grant appellants' motion for a directed verdict made at the conclusion of taking of testimony in this case.

4. That the Court erred in failing to grant appellants' motion for judgment n.o.v.

5. That the Court erred in failing to grant appellants' alternative motion for a new trial.

6. That the Court erred in failing to enter judgment herein in behalf of appellants and in entering judgment against appellants.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants.

Service Acknowledged April 28, 1949.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellants designate the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Complaint
2. Answer
3. Clerk's minutes, if any, of motion for directed verdict made at conclusion of plaintiffs' case
4. Clerk's minutes, if any, of motion for directed verdict made at conclusion of taking of testimony
5. Verdict
6. Judgment
7. Motion for Judgment n.o.v. or in the alternative, for New Trial
8. Clerk's minutes, if any, on ruling on Motion for Judgment n.o.v. or for New Trial
9. Notice of Appeal
10. Supersedeas Bond
11. Reporter's transcript of evidence and proceedings and all exhibits introduced by plaintiffs and defendants
12. Statement of points on which appellants intend to rely
13. Designation of contents of record on appeal and proof of service

14. All Clerk's minutes.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for Appellants.

Service Acknowledged April 28, 1949.

[Endorsed]: Filed April 30, 1949.

[Title of District Court and Cause.]

APPELLEES DESIGNATION OF
RECORD ON APPEAL

Comes now R. Max Etter and William E. Cullen, by their attorney of record, Appellees in the above entitled cause, and designate the following for inclusion in the record on appeal in addition to those portions of the record heretofore designated by the appellants;

Plaintiffs' Motion to Strike (dated December 17, 1948) with accompanying affidavits of R. Max Etter and William E. Cullen.

This designation by Appellees.

/s/ WM. S. HAWKINS,

Attorney for Appellees.

Service Acknowledged May 6, 1949.

[Endorsed]: Filed May 9, 1949.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to July 16, 1949.

Dated at Pocatello, Idaho, this 25th day of May, 1949.

/s/ CHASE A. CLARK,
U. S. District Judge.

[Endorsed]: Filed May 25, 1949.

[Title of District Court and Cause.]

CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers, to-wit:

Complaint

Minutes of the Court of November 15, 1948

Answer

Minutes of the Court of November 23, 1948

Minutes of the Court of November 24, 1948

Verdict

Judgment

Motion for Judgment N.O.V. or in the Alternative for a New Trial, with Affidavit of W. L. Casey attached

Motion to Strike, with Affidavits of William E. Cullen and R. Max Etter attached

Minutes of the Court of April 18, 1949

Notice of Appeal

Supersedeas Bond

Statement of Points Under Rule 19

Designation of Record on Appeal, by Appellants

Appellees Designation of Record on Appeal

Order Extending Time for Filing Appeal

Transcript of Evidence

Exhibits:

Pl. No. 1 Contract

Pl. No. 2 Second draft of Contract

Pl. No. 3 Contract

Pl. No. 4 Contract preliminary to final draft

Pl. No. 5 Copy of final agreement

Pl. No. 6 Photostatic copy of letter, Mar. 23, 1948

Pl. No. 7 Letter dated Apr. 30, 1948

Def. No. 8 Copy of Letter, Apr. 28, 1948

Def. No. 9 Copy of Letter, Apr. 14, 1948

Pl. No. 10 Preliminary draft of letter

Def. No. 14 Statement of Cullen & Etter to Sulphur Springs, etc.

Def. No. 15 Photostatic copy of contract

Def. No. 16 Sales contract

Def. No. 17 Chattel mortgage

Def. No. 18 Receipt to W. L. Casey

are that portion of the original files as designated

by the parties and as are necessary to the appeal under Rule 75 (RCP).

In Witness whereof, I have hereunto set my hand and affixed the seal of said court, this 5th day of July, 1949.

[Seal] /s/ ED. M. BRYAN,
Clerk.

[Title of District Court and Cause.]

TRANSCRIPT

This matter was heard before Honorable Chase A. Clark, United States District Judge, sitting with a Jury at Coeur d'Alene, Idaho, on November 23, 1948

Appearances:

William S. Hawkins, Esq., Coeur d'Alene, Idaho, Attorney for the Plaintiff.

W. J. Nixon, Esq., Bonners Ferry, Idaho, George W. Young, Esq., Spokane, Washington, Attorneys for the Defendants.

November 23, 1948, 10 o'clock a.m.

WILLIAM CULLEN

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Where do you reside?

(Testimony of William Cullen.)

A. Spokane, Washington.

Q. What is your occupation?

A. Attorney at law.

Q. You are a member of the firm of Cullen and Etter?
A. Yes sir, Cullen and Etter.

Q. Your office is where?

A. 726 Paulsen Building.

Q. You are licensed to practice law in the State of Washington?
A. Yes sir.

Q. And in the Federal Court?
A. Yes sir.

Q. When were you admitted to practice?

A. September 1936.

Q. Have you continuously practiced since that time?

A. I started to practice in May or June 1937.

Q. And have you continuously practiced since that time?

A. Excepting five years in the Marine Corps.

Q. Who is your partner in that firm?

A. My father and Mr. Etter.

Q. Are you acquainted with Mr. Casey, the defendant in this action?
A. Yes sir.

Q. When did you first meet him?

A. I first met Mr. Casey February 25, 1948.

Q. February 1948?
A. Yes sir.

Q. And where was that?

A. The mezzanine floor of the Davenport Hotel.

Q. At Spokane?
A. Yes sir.

Q. Under what circumstances?

(Testimony of William Cullen.)

A. Mr. Casey asked Mr. Etter to have one of us come to a meeting of the Gypsum Company.

Q. You attended that meeting? A. Yes sir.

Q. Was Mr. Casey present? A. Yes sir.

Q. Was Mr. Kienholz?

A. Yes sir, and Mr. Davis; Mr. Bush; Mr. Myers; Ed Crowley and Mr. Denny, investigator for the Security and Exchange Commission.

Q. What was the gist of that meeting? [2*-3]

A. Well, that was to discuss the Sulphur Springs Gypsum set-up and what could be done about Mr. Adams——

Q. Who was Mr. Adams?

A. He was a resident of Spokane who owned a majority of the stock of the Sulphur Springs Gypsum Company.

Q. He owned over fifty-one per cent?

A. Much more than fifty-one per cent.

Q. What was the purpose of that meeting—rather what did they decide?

A. They didn't decide anything; each one said what he invested and what was said by Adams, and there was a discussion of what was said and what could be done to make it a successful company. I talked to them but I didn't advise them because I didn't know whether I would be employed or not.

Q. Did they have books of account at that time?

A. I don't recall.

Q. You did get them? A. Yes.

Q. And when did you get them?

(Testimony of William Cullen.)

A. The books of account including an audit made by accountants at Thermopolis, Wyoming, was brought in the next morning.

Q. Did you meet with the Directors the next morning?

A. We met with Mr. Bush, the president of the company. [4]

Q. What was done and said at that time?

. Mr. Young: I object to any conversation outside the presence of Mr. Casey.

The Court: I think he may answer with the understanding that this testimony will have to be connected up or it will be stricken. I take it this is simply preliminary.

Mr. Hawkins: That's right Your Honor.

Q. Were Kienholz, Bush, Davis and Casey the directors at that time?

A. Yes sir. As I recall Mr. Simanton brought the books in.

Q. And Mr. Bush was present?

A. Yes sir.

Q. Before Mr. Simanton brought the books of account to your office?

A. Yes sir.

Q. Were any instructions given at that time?

A. He wanted us to examine the books?

Q. He wanted you to examine the books?

A. Yes sir, and make recommendations to them as soon as possible.

Q. Did you make an examination and report?

A. Yes, we did, it is my recollection either that day or within two or three days of the time they

(Testimony of William Cullen.)

brought the books, Mr. Casey called and asked how we were getting along. They wanted immediate action and wanted to meet us as soon as they could.

Q. What did you tell them?

A. It was Wednesday Mr. Casey and Mr. Davis came to the office and told us Mr. Bush was coming——

Q. What did you do then, Mr. Cullen?

A. We went over the facts revealed by the audit and the minutes and did what briefing we could on the matter.

Q. Did you do some research and some briefing?

A. Yes, a week-end had elapsed and we spent Saturday afternoon and about half the night in the law library.

Q. Did you do any research on the law?

A. Yes we did, particularly because it was a Wyoming corporation and we were not too familiar with the Wyoming statutes.

Q. And did you familiarize yourselves with the Wyoming Law relative to this matter?

A. Yes, as far as we were able in the time.

Q. Did you have a meeting with the Board of Directors and advise them of your findings?

A. Yes sir.

Q. And when was that?

A. Well, we actually had a meeting as I recall it on Saturday afternoon about the 6th of March. However, prior to that time Mr. Casey and Mr. Davis had been in and we suggested a course of action and he said he would inform Mr. Bush. [6]

(Testimony of William Cullen.)

Q. Mr. Casey said that? A. Yes sir.

Q. Mr. Casey was in, then, two or three times?

A. Yes sir.

Q. You say you had a meeting on Saturday?

A. Yes sir.

Q. What, if anything, was recommended?

A. I have some notes here——

The Court: You may refer to them if it is necessary Mr. Cullen.

Q. Now, what was recommended?

A. On Saturday, March 6, Mr. Bush, Casey, Kienholz and Davis came to the office at about two o'clock. We went over what we found in the audit; Mr. Casey advised us that he would ask Mr. Adams to come up and a few minutes after, he came up.

Q. Did you have a meeting with Adams.

A. Yes, we did. He adopted the attitude that as long as he owned the majority of the stock he felt that he could do pretty much as he wanted to. From the audit we found that there has been royalties of fifty cents a ton assigned to Mr. Bush and royalties of fifty cents a ton from the men mining the gypsum to Casey, some notes by the company and some that Adams owed, one for \$25,000.00, one for \$50,000.00 likewise one for \$14,000 some odd against the property of the company for which the auditors could not find any consideration in the audit of the books of the company for [7] or to show why this should be against the property.

Q. Why the mortgage should have been or had been issued?

(Testimony of William Cullen.)

A. That is right, that could not be found.

Q. Mr. Bush had advanced some forty thousand dollars to the company? A. Yes sir.

Q. And the Audit didn't show any of that money going to the company?

A. That's right, the audit didn't show any of that money going to the company; Mr. Bush had two notes signed by Mr. Adams. Mr. Adams admitted that he owed \$23,500.00 to the Probation Department of Alameda County, California, and there were other items and other royalties which were not accounted for, there were some that came into the office that were not there at the first meeting. We had a long discussion at this meeting with Mr. Adams.

Q. Mr. Casey was present?

A. Yes sir, it lasted about two hours and various directors would chime in from time to time as to how they advanced their money and what Mr. Adams told them. It was agreed by Mr. Adams that he would like to take over the company and would make an attempt to liquidate what these people had in the company.

Q. Did you discuss the question of receivership at that time?

A. That was one of the first things that Mr. Bush and Mr. [8] Casey asked us; if a receivership would help them get their money. We advised them of the difficulties of that, with them living in Washington and the property in Wyoming and the advances not showing on the books; we advised that a

(Testimony of William Cullen.)

receivership would result in large fees to the receiver and to the attorneys and nothing for them; that was decided against. After Mr. Adams left we told Mr. Casey, Mr. Bush, Mr. Davis and Mr. Kienholz that they could not—we advised them that in effect they couldn't do anything as directors and that we would represent them as individuals——

Q. Why couldn't you represent them as directors?

A. They couldn't use the company funds to get their own money back.

Q. Was it by reason of owning stock?

A. Yes, that was another reason.

Q. And they could have been outvoted?

A. Yes sir, they could.

Q. And what did you recommend?

A. That a contract be drawn up with Mr. Adams to pledge a number of shares of his stock to represent that he would pay them off, or turn over to a voting trust all of the shares of stock he controlled.

Q. Did these men—strike that—in the presence of Mr. Casey was anything said about having consulted with other [9] attorneys?

A. Yes sir.

Q. What was that?

A. In the presence of Mr. Casey, they told us that they had been to two firms who advised them there was nothing they could do?

Q. At this meeting was anything done to establish the amount invested, or coming back on the part of the individuals?

(Testimony of William Cullen.)

A. Yes sir, but I don't recall the particulars just now at that meeting.

Q. That was discussed?

A. Yes, that was, I know they told us there was roughly a hundred and fifty thousand dollars they had in there together.

Mr. Hawkins: Handing you Plaintiff's Exhibit 1 will you state what it is?

A. That is the first contract we drew up looking toward a liquidation of the individual's investments in the Sulphur Springs Gypsum Company.

Q. Was that drawn at the request of Mr. Casey and his associates? A. Yes sir, it was.

Mr. Hawkins: I offer this exhibit in evidence—I wonder if I may ask another question?

The Court: Go ahead. [10]

Q. This draft was prepared or drawn in your office?

A. Yes sir, prepared by Mr. Etter and myself.

Mr. Young: We object to that, it is a draft of pages one to five and not signed; it has a number of marginal writings on it; it does not purport to bind anyone; it is something prepared in a law office and probably never used. We object to it as incompetent and immaterial.

The Court: You intended to re-offer it after your question?

Mr. Hawkins: That's right, I did so intend.

The Court: It may be admitted.

Q. Did you go over this Exhibit 1 with Casey and his associates?

(Testimony of William Cullen.)

A. We went over it with him.

Q. And the pencil notations were made as a result of that conversation? A. Yes sir.

Q. Now, Mr. Cullen, you have been handed Plaintiff's Exhibit 2. State what it is?

A. That is the draft which was a result of the conversation held on this contract with various members—rather with various individuals we represented.

Q. Exhibit 2 is a result of the conferences after drawing Number 1? [11]

A. That is correct?

Q. Did you have a conference concerning Exhibit Number 2?

A. Yes, we had a conference concerning Exhibit 2 also.

Q. Were these conferences on different days?

A. Yes, sometimes one would come and sometimes all would come.

Q. Did Mr. Casey go over these drafts with you?

A. With Mr. Etter and myself, I think he was there with Mr. Davis and Mr. Biggerstaff.

Q. Were these notations made as a result of conferences?

A. Yes sir, I remember he asked us to put in the name of Wyoming Mineral Products Company; that was his company.

Q. He asked you to put that in?

A. Yes sir.

Mr. Hawkins: I offer in evidence Exhibit 2 marked for identification?

(Testimony of William Cullen.)

Mr. Young: We make the same objection which was heretofore made?

The Court: The same ruling. This only goes to show the amount of work, that is the only purpose for which it is admitted.

Q. Now, Mr. Cullen, handing you Exhibit Number 3 I will ask you to state what that is, if you know?

A. That is two sheets from the contract we drew concerning this same matter. This was taken up in Mr. Casey's presence. At that time Mr. Adams had a lawyer from [12] Billings to represent him. We talked about this provision about the Adult Probation Department; Mr. Adams said they were going to raise the money and said that he couldn't do it—rather Mr. Huntington said they wouldn't do it without these matters adjusted and——

Q. Now, Mr. Cullen, who was he—Mr. Huntington?

A. An attorney from Billings.

Q. Then this is two sheets prepared as a draft by you?

A. We designated what each party claimed. Mr. Adams told us what each had coming and we put that in the final draft of the contract.

Mr. Hawkins: I offer Exhibit marked 3 in evidence at this time.

Mr. Young: I am making the same objection, however, in view of the statement of the Court, I understand none of these documents are binding on my client.

(Testimony of William Cullen.)

The Court: These are just to show the amount of labor done in order to arrive at a fair fee. It may be admitted for that purpose. The same ruling applies to the other exhibits.

Q. Handing you Exhibit Number 4 will you state what that is?

A. Yes sir, this is the contract immediately preliminary to the final draft. We went over this in the presence of most all of the people we represented including Mr. Casey and also Mr. Huntington and Adams. We spent [13] most of a Saturday afternoon going over this.

Q. They had copies of this?

A. We had prepared about six copies. I think they all looked it over. I am sure they all read it at that time.

Q. Mr. Huntington went over this with you; he representing Mr. Adams.

A. Yes sir.

Q. Mr. Davis, Mr. Kienholz, Mr. Casey and Mr. Bush were present?

A. Yes sir.

Q. And had copies of this instrument?

A. Yes sir.

Q. And actively participated in the discussion of the points involved?

A. Yes sir. When this discussion was going on we were seated all around and I got from each what he claimed he had advanced to the company or Mr. Adams.

Mr. Hawkins: We offer this exhibit in evidence.

Mr. Young: The same objection I have hereto-

(Testimony of William Cullen.)

fore made. It is incompetent, irrelevant and immaterial.

The Court: It may be admitted for the same purpose as the other exhibits.

Q. Now you have been handed Exhibit numbered 5, I will ask you to state what that is? [14]

A. This is a copy of the final draft of the agreement entered into by Mr. Adams on one side; Mr. Bush, Mr. Kienholz, Mr. Davis, Mr. Casey, The Wyoming Mineral Products Company, Mr. Simanton, Mr. Biggerstaff, Mr. Raydk and Mr. Evers and Anderson Brothers on the other. After Mr. Adams put his name on, then these names were put on, people we represented.

Q. This was the final draft? A. Yes sir.

Q. Was it signed by all the parties to the contract?

A. By everyone present on the date it was presented, it was not signed by Mr. Casey.

Q. He was not present at that time?

A. No sir, he wasn't.

Q. At page four is there outlined the claims of the respective parties? A. Yes sir.

Q. What is the claim of W. L. Casey?

Mr. Young: Objected to as incompetent, irrelevant and immaterial. The contract was never signed by Mr. Casey, that is why it would not be a representation of what his claims were?

The Court: He may answer.

A. \$69,500.00.

(Testimony of William Cullen.)

Q. Was that the confirmed figure by Mr. Casey?

A. He arrived at that with Mr. Adams after a long discussion in front of all of us. He thought he had more coming and said he would go to Thermopolis and check it with the men at the mine and return and give us the accepted figure.

Mr. Young: Mr. Casey never signed Exhibit 5 did he Mr. Cullen?

A. No, he never signed it.

Mr. Young: We object to that as incompetent, irrelevant and immaterial and not binding on Mr. Casey.

The Court: Was it offered.

Mr. Hawkins: I intended to offer it, and will at this time.

The Court: It may be admitted.

Q. Referring back to exhibit which was admitted, number five. Did Mr. Casey have a copy of that contract?

A. He requested and received a copy from Mr. Etter before he went to Thermopolis.

Q. Handing you Exhibit marked number 6 I will ask you to state what it is?

A. That is a copy of a letter written by Mr. Casey to Adams setting forth the amount he arrived at under this contract; that he and Mr. Adams agreed on.

Q. They finally agreed what Mr. Casey had coming? [16]

A. Yes sir.

Q. How did you get possession of that photo-static copy?

(Testimony of William Cullen.)

A. It was around the 5th or 6th of April Mr. Adams called me from Bonners Ferry and said that he was going to meet with Mr. Casey and arrive at these figures and that he would like to come to the office when he was through. After I had gone home to dinner Mr. Casey called me and said he had been in conference with Mr. Adams and they finally arrived at what he and Mr. Adams agreed that Mr. Casey put into the company, and that Casey thought he had a great deal more coming and that he would send me a copy of it.

Q. Who delivered the letter?

A. Mr. Adams brought in the signed instrument and showed it to me to show that Casey had agreed to it. He said: "I will have a photostat of it and bring you a copy because Mr. Casey wanted you to have one."

Q. And is that the photostat? A. Yes sir.

Q. Where did Mr. Casey call you from?

A. Bonners Ferry.

Mr. Hawkins: We offer Exhibit 6 in evidence.

Mr. Young: No objection.

The Court: Admitted.

Q. Did you later talk to Mr. Casey about that?

A. Mr. Casey called me about ten minutes after Adams left and asked if Adams had been there with a copy and I asked him if he had Mr. Adams sign his copy and he said Adams signed several copies and he would have it up there.

Q. It says there "March 23," is that the same date as the contract?

(Testimony of William Cullen.)

A. It is the same date as the contract. I understood Mr. Casey had it that way—I understood from Casey that he had it that way to show that he agreed with the contract.

The Court: As to what he understood from Casey would be incompetent.

Q. When did Mr. Casey sign that letter?

A. He told me over long distance that he signed it Monday—when he called me on Monday.

Q. Was that March 23rd?

A. On April 5th or 6th I have a note on this, when he called me from Bonners Ferry. May I refer to that?

The Court: You may do that.

A. Yes, it was Monday April 5 he called me that he had been in conference.

Q. Did he tell you about the date it bore?

A. He said “wasn’t that contract signed March 23” and I said “yes” and that is all the conversation we had about that.

Q. Was Casey in your office after that? [18]

A. Yes sir, many times.

Q. Concerning this?

A. Yes, concerning this same subject matter.

Q. Was Mr. Keinholz with him?

A. Frequently.

Q. Were Mr. Busch and Mr. Davis with him?

A. Yes sir, repeatedly, but Casey was the most frequent visitor.

Q. What was the subject of conversation on those visits?

(Testimony of William Cullen.)

A. Shortly after this, on Tuesday the 13th Mr. Casey called the office and talked to me, he wanted advice as to whether he should make payment on this note that Mr. Adams and the company owed to the California Board and I said I didn't think he should pay it, and he said that he would be in in the afternoon when Mr. Etter would be back from the Court house to talk to both of us; he did come in and he brought some of his stationery, the Wyoming Mineral Products Company stationery and we wrote a letter to a man named Liner in California who had the note that Adams had given—anyway the letter was concerning the note Adams had given, of the Sulphur Springs Gypsum Company, for what he owed the Probation Department.

Mr. Young: I fail to see the materiality of this matter.

The Court: With the understanding that it will be connected up it may remain.

We will take a ten minute recess at this time. [19]

November 23, 1948, 11:05 a.m.

Q. Mr. Cullen, after this letter—this photostat of the letter was brought to your office what happened then?

Mr. Young: What do you refer to now?

Mr. Hawkins: I think it was Exhibit 6.

A. That was the 5th of April. After that all of the people we represented, including Mr. Casey were in the office and called many times. I think we

(Testimony of William Cullen.)

had some contact with one or more of them every day from that time until the last of April.

Q. Do your records show how many times Mr. Casey called at your office?

A. My recollection is that he telephoned or was in the office about thirty-one times.

Q. Did you testify that you were paid five hundred for the examination of the corporate books?

A. I don't know whether I testified, but we were paid five hundred.

Q. When was that?

A. We billed the Sulphur Springs Gypsum Company right after the first conference with Mr. Adams. As I recall it was about the sixth of March and then that was about the 9th, yes, after we billed the company?

Q. When were you paid?

A. I think we billed them that afternoon and we were paid on [20] the 9th, I think it was.

Q. You were paid prior to the time this contract was drafted at all, is that right? A. Yes sir.

Q. Did you go to Montana in connection with this matter. A. Yes sir.

Q. Who accompanied you?

A. I went by myself but Mr. Casey flew over. I went on the train.

Q. What was the purpose of that trip?

A. To collect the money due on the assignment from the Sulphur Springs Gypsum Company to the new investors.

Q. Did that involve drawing corporate proceedings?

(Testimony of William Cullen.)

A. We drew minutes for the two directors—in Spokane to have two new ones elected, and Mr. Casey went over to have a quorum present there.

Q. What did you do in Montana?

A. We had an all day's conference. It was Thursday the 6th of May, we had an all day's conference in the office of Mr. Huntington and I received a check to myself and Mr. Etter for \$88,400.00.

Q. For \$88,400.00? A. Yes sir.

Q. What was that for? [21]

A. To represent the interest of everyone on the contract except Mr. Casey.

Q. Did you receive any other check?

A. Yes sir, it was handed to me.

Q. What was that?

A. \$16,800.00 made out to Mr. Casey.

Q. By whom was it handed to you?

A. Mr. Charles Vandenhook.

Q. You gave it to Mr. Casey? A. Yes sir.

Q. Had he previously received any money?

A. A substantial amount before we went to Montana.

Q. How much?

A. He told me about \$40,000.00.

Q. Anything else?

A. A ten thousand dollar note signed by Mr. Adams and George Stinton—I found that out—

Q. That would be about \$50,000.00?

A. Yes sir.

(Testimony of William Cullen.)

Q. What did he say about getting the \$40,000.00?

A. I didn't know that he had received that until the Saturday morning just prior to the time I went to Montana, I got a letter from Mr. Huntington——

Mr. Young: The letter would be the best evidence. [22]

A. He didn't say that he had paid any money. He said Mr. Casey had turned over the workings of the company.

Q. Do you have the letter?

A. I think it is there.

Q. Did you talk about this \$40,000.00?

A. He told me on Monday night that he had gotten the money so that these people would be in a substantial sum and wouldn't back out on their agreement.

Q. These people who were refinancing this company, in Montana? A. Yes sir.

Q. Are those the people that put up the \$88,000.00 that you brought back? A. Yes sir.

Q. And the \$16,000.00 check? A. Yes sir.

Q. Did Mr. Casey get a note?

A. He received a note for \$2,000.00 signed by Mr. Adams personally.

Q. Then he got \$40,000.00 cash, a ten thousand dollar note, a sixteen thousand dollar check and a two thousand dollar note? A. That is correct.

Q. After these moneys were paid over did you have a conversation with Mr. Casey that day?

A. We had several conversations, one immedi-

(Testimony of William Cullen.)

ately after the money [22a] paid over and we turned over the books and seal and stock that I had in my possession, to Mr. Huntington who represented the new company.

Q. Was there any money transferred?

A. Mr. Casey turned over the funds he had in his possession of the Sulphur Springs Gypsum Company.

Q. Do you remember the amount of money?

A. Slightly over twenty-six hundred dollars.

Q. Were all of the assets of the Sulphur Springs Gypsum Company turned over to the new company at that time.

A. All the assets and obligations were turned over.

Q. Did you have any further conversation with Mr. Casey that day? A. Yes sir.

Q. Where? A. In the lobby of his hotel.

Q. That is where?

A. At Billings, Montana.

Q. When was that?

A. About 7:30 in the evening.

Q. What date?

A. Thursday the 6th of May.

Q. What was the substance of that conversation?

A. I went into the hotel and he was talking to Mr. Jensen, whom I met previously, Mr. Casey commented on how lucky [23] we had been today. He said "as soon as I get back to Spokane I will get hold of the other boys and tell them what a wonder-

(Testimony of William Cullen.)

ful job you have done; I am going to pay you myself, several thousand dollars."

Q. Did you have any further conversation that day? A. Not that day.

Q. When did you have any further conversation?

A. I got back Saturday morning and called all the people concerned, including Mr. Casey,—I called Mr. Casey's office, and then on the following Tuesday he called me in the morning.

Q. Mr. Casey called you? A. Yes, sir.

Q. He talked to you? A. Yes, sir.

Q. What was the substance of that conversation?

A. He had just gotten back from Montana and asked if I had deposited the check; he said "there is nothing to worry about," he said "I rode back to Bozeman" and then he said "I know I owe you quite a bit of money and I will be in to see you later in the week, be sure to tell me when you are meeting with the others."

Q. Did you notify him?

A. I told him I was having a meeting Friday and he said he would be there. [24]

Q. He said he would be there?

A. I think his words were "I will be there for sure."

Q. Did he come? A. No, sir.

Q. Did he ever come to your office again?

A. Never did.

Q. Did you talk to him again about this matter?

(Testimony of William Cullen.)

A. Yes, sir.

Q. When and under what circumstances?

A. We had a meeting with the other people we represented except Mr. Simanton and Mr. Davis who were out of town and at the end of the conference Mr. Busch suggested that I call Mr. Casey.

Q. Did you call him?

A. Yes, sir, and he told me that he had gotten to work late and that he couldn't come over and he knew that he owed us quite a bit of money and that he would come over the next morning, or the following Monday.

Q. Did he come? A. No, sir.

Q. Did he come the next Monday?

A. No, sir.

Q. Did you call him?

A. I called him before five o'clock, I wanted to go home early; [25] he wasn't in and I have never talked to him since.

Q. Did the other parties to this contract pay you your fees? A. Yes, sir.

Q. Did Mr. Casey? A. No, sir.

Mr. Young: We object to this question, he asked if the parties to this contract, and Mr. Casey did not sign the contract.

The Court: The only question here is whether Mr. Casey owes these gentlemen a fee and how much, it doesn't make any difference what the others paid him, if anything, does it.

Mr. Hawkins: At this time I offer in evidence plaintiff's exhibit 7 marked for identification.

(Testimony of William Cullen.)

The Court: It may be admitted.

Q. Mr. Cullen, as one of the parties who rendered this service, what is your opinion as to the worth of the services rendered to Mr. Casey?

Mr. Young: We object to this unless he states some facts. He would be entitled to pay only up to a certain point, as I view it, when he was informed that Mr. Casey was handling the matter.

The Court: I will permit him to answer this question. [26]

A. I think it is worth fifteen thousand dollars at least.

Q. What factors do you take into consideration. What are some of the elements?

A. The experience I have had; the fact that Mr. Casey was not a regular client but had just come in on this transaction; the fact that there was a large sum of money involved and the fact that we were dealing with Mr. Adams, we didn't know that we would get anything and we were much more successful than we expected to be.

Mr. Hawkins: You may inquire.

Cross-Examination

By Mr. Young:

Q. You first met Mr. Casey when he was attending a meeting of the Board of Directors and stockholders of the Sulphur Springs Gypsum Company on the mezzanine floor of the Spokane Hotel?

A. A general meeting concerning the Company, yes, sir.

(Testimony of William Cullen.)

Q. You were at their meeting?

A. Yes, sir.

Q. And you had other meetings with the Board of Directors of the Company?

A. That is correct.

Q. As a result of these meetings the Company employed you to look into the internal matters of the Company? A. Yes, sir. [27]

Q. The Company authorized a retainer of five hundred dollars? A. That is correct.

Q. You were paid five hundred dollars?

A. Yes, sir.

Q. There was the matter of the management of the corporation that was particularly troubling the Board of Directors and the stockholders?

A. Yes, sir.

Q. Concerning several matters?

A. Yes, sir.

Q. Mr. Casey was put on the Board of Directors succeeding some old member of the Board of Directors that had existed before?

A. He and Mr. Busch, Mr. Keinholz, Mr. Simanton and Mr. Davis were all elected December 15, 1947.

Q. That was a result of a sort of revolution that took place with the Sulphur Springs Gypsum Company? A. That was my understanding.

Q. When Mr. Casey met with you in the office other members of the Board of Directors were along? A. Sometimes and sometimes not.

(Testimony of William Cullen.)

Q. As a result of these meetings and conversations had with Mr. Casey and the other members of the Board of Directors you prepared a contract for the signature of the parties?

A. For the signature of the people we represented, yes, sir.

Q. The purpose of that contract was to work out a reorganization [28] of the Sulphur Springs Gypsum Company?

A. So each one could get back the money he had in the Company.

Q. It was intended when the contract was performed that there would be a new ownership of the Sulphur Springs Gypsum Company?

A. Yes, sir.

Q. In this contract you provided for attorneys' fee which you were to be paid?

A. Not entirely, no.

Q. I call your attention to paragraph 12 of the contract in which this language is used: "The said party of the first part does also agree that the law firm of Cullen and Etter,"—now the first part was Mr. Adams?

A. Yes, sir.

Q. "The said party of the first part does also agree that the law firm of Cullen and Etter, 726 Paulsen Building, Spokane, Washington, shall represent and shall perform all such services as may be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the parties of the second part and relative to the oper-

(Testimony of William Cullen.)

ation during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in Trust, if offered, other claims for payment by said party of the first part, including shares of stock in the [29] said Sulphur Springs Gypsum Company, notes signed by the Company or the first party, or other evidences of indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of not less than \$4,000.00," that was the figure fixed?

A. We put four thousand dollars in there but it was for a different reason?

Q. "Subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement"?

A. That is correct.

Q. What work was not contemplated in the agreement. What work were you going to do after this agreement assuming that the contracts were performed?

A. Turning the books of the corporation to the new parties or in the event that Mr. Adams didn't liquidate each individual's obligation we would have control of the Company as the contract provides.

(Testimony of William Cullen.)

Q. If Mr. Adams performed the terms of this contract all that you would have to do was the ministerial work; the transferring [30] of the assets delivered to your possession, to the new owner or the new Company?

A. That might be so if he carried out his part.

Q. You were paid as provided in the contract?

A. Not in that way.

Q. You have been paid approximately six thousand dollars?

A. By each individual on the contract.

Q. Have you been paid as a result of this transaction, six thousand dollars? A. Yes, sir.

Q. In addition to the retainer of five hundred dollars?

A. Paid for work we did for the company?

Q. You were given an expense check in Billings for \$150.00? A. Yes, sir, \$150.00.

Q. From the Sulphur Springs Gypsum Company? A. That is correct.

Q. Under the terms of this contract Mr. Adams agreed to procure a purchaser or purchasers for the Sulphur Springs Gypsum Company within a period of six months at a price sufficient to take over the stock, to buy every stockholder out and pay him six per cent with the amount of his investment?

A. That is correct.

Q. As an assurance of the performance of the contract he delivered or agreed to deliver fifty thousand shares of the stock of the Sulphur Springs

(Testimony of William Cullen.)

Gypsum Company to be forfeited [31] in the event he failed to perform the contract within six months?

A. That is correct.

Q. Following the entering of the contract under these terms, Mr. Adams went out and procured a buyer and then notified you that he was ready; that the buyer had cash arranged for and that all that was left for you to do was go to Billings, get the money and have it paid over to you, and you in turn pay it to the people whom you represented?

A. That is correct, but it was not as easy as you make it sound.

Q. What difficulty was there; Mr. Adams put up the money, or arranged to have you given the money and all you had to do was to make the proper receipt and put it in the bank account and pay it out to the people you represented. That was all there was to it? A. No.

Q. What else?

A. When we got to Billings,—well, before we got to Billings several things came up, and then we spent a whole day in Billings fighting and wrangling, and at lunch there was better than fifty per cent of the people that would not——

Mr. Young: ——Just a moment, Mr. Cullen.

Q. ——Isn't it a fact that Mr. Casey had forty thousand dollars of these peoples' money so that they couldn't back out? [32]

A. Yes, he told me he had forty thousand dollars.

Q. And they paid you the money and you put

(Testimony of William Cullen.)

it into your account and paid it out to the clients you represented, that is, you paid them the amount that you thought was coming to them, or the amount you thought was their share, isn't that correct?

A. Not that I thought was their share, what they said was their share.

Q. The only contract that you had for attorneys' fees ran between you and Adams and is represented by the final draft of your contract which you have put in evidence, which I believe is exhibit number 5?

A. That is not so.

Q. I call your attention to this fact; when this contract was submitted to Mr. Casey in its final form, it was in your office?

A. What do you mean?

Q. You mentioned that Mr. Casey got a copy of the contract as finally drawn between Adams and the clients you represented?

A. Yes, he came to get a copy so he could go to Wyoming and show it to the people mining the property.

Q. Did you request him to sign it?

A. No, I didn't.

Q. Did you expect him to sign it at the time you gave it to him? [33]

A. No, I didn't, no one was to sign until Mr. Adams did.

Q. As a matter of fact Mr. Casey declined to sign the contract?

A. After we had Adams sign I never asked him to sign it.

(Testimony of William Cullen.)

Q. You never asked him? A. No, sir.

Q. This agreement was prepared by you and Mr. Etter? A. Yes, sir.

Q. Paragraph one has this language: "That this agreement shall be binding on each and every individual who signs the same to the full extent of his obligation undertaken under the terms of this agreement, and no other." It was your intention that these individuals that you represented would deal with you separately for the purpose of collecting their respective sums?

A. I don't think I understand you. We represented them separately if that is what you mean.

Q. What you were getting at was you wanted a contract that would protect you in the attorneys' fees and in the matter of handling this business?

A. No, sir.

Q. What was the purpose of this agreement and specifying the attorneys' fees to be paid and then specifying that it should not be binding on anyone other than those who signed?

A. We were employed by people whom we represented to get Mr. [34] Adams' signature on the contract and to get a pledge of his stock; to have him agree if he couldn't raise the money that he would turn over stock that represented the control of the company. During negotiations with Adams' Attorney it was understood if he didn't carry out the contract certain items listed as advances would have to be paid,—this had been entered into prior

(Testimony of William Cullen.)

to the time these individuals had been elected to the Board of Directors, and showed on the books of the Company and were valid so far as the Company records showed. One was four thousand dollars, thirty-five hundred of which went to Huntington prior to December 15 and five hundred dollars for work after that date,—after the date of the election and we put that in as a bargaining point on the whole item.

Q. This language is rather simple: "This agreement shall be binding on each and every individual who signs the same, to the full extent of his obligation undertaken under the terms of this agreement, and no other." You intended the agreement was to be binding on only those who signed it?

A. That is correct.

Q. Mr. Casey didn't sign it?

A. No, he didn't sign it.

Q. The agreement provides that Fifty thousand shares of Sulphur Springs Gypsum Company stock is to be delivered to Mr. [35] Casey and some other men by Mr. Adams to be held in trust by them?

A. Yes, sir.

Q. That fifty thousand shares was never delivered to Mr. Casey as Trustee?

A. Yes, it was.

Q. When was it delivered?

A. In our office to Mr. Casey and Mr. Busch.

Q. Did they take it?

A. They didn't physically take it; he brought it and Mr. Busch turned it to us to hold.

(Testimony of William Cullen.)

Q. Mr. Casey in failing to sign this didn't become Trustee for this fifty thousand shares of stock. You don't contend that he became Trustee of the stock?

A. No, I don't,—he did agree with the instrument——

Mr. Hawkins: ——I shall object to this, it is argumentative.

The Court: They are a couple of lawyers, let them argue.

Q. Now, as a matter of fact, when this contract was executed, it provided the terms of a settlement between Mr. Adams and the other stockholders of the Sulphur Springs Gypsum Company?

A. Yes, sir. [36]

Q. The contract embraced the terms of the settlement? A. That is not correct.

Q. All that remained was for Adams to perform?

A. Yes, sir, or fail to perform.

Q. He did perform? A. Yes, sir.

Q. Mr. Adams paid you the fee he agreed to under the terms of the contract?

A. No, sir, Mr. Adams didn't.

Q. Who did pay you?

A. I got hold of some money,—the check was signed by Charles Vandenhook, I understood the money came from Sinton.

Q. Mr. Cullen, you and Mr. Adams agree as to the amount of attorneys' fee he was going to pay you? A. I don't so understand.

(Testimony of William Cullen.)

Q. Didn't he pay you two thousand dollars in addition to all the sums of money that he, in this agreement, agreed to pay?

A. In addition you say?

Q. Yes.

A. We got something all right but all the items were cut.

Q. You arrived at what the attorneys' fee would be, what Mr. Adams owed you,—you arrived at an agreement and accepted? [37]

A. We never felt that Mr. Adams owed us anything.

Q. The agreement runs from Adams to these other persons in the contract?

A. That's right.

Q. The agreement provides for a four thousand dollar attorneys' fee?

A. Yes, that was put in, as I said, as a bargaining point because Mr. Huntington claimed that much money.

Q. And then Adams was to have a cut on that fee provided he produced within sixty days?

A. I don't understand.

Q. The fee was to be reduced in the event that Adams completed the terms of the contract within sixty days?

A. This is the first time I ever heard that.

Q. How much did Adams pay you as attorneys' fee?

A. He didn't pay anything.

Q. He didn't pay you anything?

(Testimony of William Cullen.)

A. He didn't pay anything, we got certain sums of money under this contract and we brought it back and gave it to the people we represented.

Q. You received two thousand dollars more than specified in the contract?

A. We actually received, if you would add up all these items due the people we represented, less Mr. Casey, we collected less than these items total by some Thousand dollars. [38]

Q. You received Six Thousand dollars, obviously that is Two Thousand dollars more than the amount provided in the contract?

Mr. Hawkins: Now, we object to that as entirely argumentative.

The Court: I think the only question is whether there was a contract between him, or between this firm,—the plaintiffs and Mr. Casey and whether Mr. Casey owes them anything.

Q. Now, Mr. Cullen, you say that Mr. Casey owes you Fifteen Thousand dollars because of these services you rendered in connection with this contract? A. I feel he does.

Q. Your services were all,—strike that, please,—the only services that you rendered after you entered into this contract was the services of going to Billings, Montana, spending a day there and drawing some Board of Directors' minutes or corporate minutes and taking some money, putting it in your pocket and bringing it to Spokane, after you completed all your services in connection with the contract? A. That is not correct.

(Testimony of William Cullen.)

Q. What services did you render in addition to what I suggested?

A. I think I have said that Mr. Casey brought in a letter which he wanted us to write to this Attorney. [39]

Q. Including the letter you wrote, what other service did you perform?

A. Mr. Casey, about the end of April brought in an advertisement from the Billings paper it was concerning the owners of the Wyoming soil sulphate, purportedly by the Wyoming Mineral Products Company. He wanted us to write to Mr. Huntington and see why this was in the paper and so on and so forth.

Q. You wrote another letter, then, now, what else did you do following the preparation of exhibit 5, the contract?

A. After it became apparent that Mr. Adams was going to perform on this contract Mr. Casey was in the office seeking advice as to his individual dealers for the distributing of this soil sulphate.

Q. What did you do in connection with that?

A. I consulted with him and Mr. Etter and I drafted a rough contract and gave it to him.

Q. Have you that contract? A. No, sir.

Q. What else did you do for Mr. Casey?

A. I assisted him in negotiating the amount he was to get while I was in Billings.

The Court: We will recess at this time until 2 this afternoon. [40]

(Testimony of William Cullen.)

2 o'Clock P.M., November 23, 1948

The Court: You may proceed.

Q. Mr. Cullen, have you told us everything that you then did, every service that you rendered by way of professional service other than the contract which you ultimately prepared, which was executed by Mr. Adams and the other persons signing it?

A. Yes,—getting the contract signed was the easiest part of the job.

Q. Have you told us everything else by way of services that you claim in the way of rendering services for Mr. Casey, other than the contract, exhibit 5? A. Yes, sir.

Q. Taking the letter that you wrote concerning the advertising matter in the Billings, Montana, paper. Have you a copy of that?

A. Yes, we have a copy.

Q. Will you produce it? A. Yes, sir.

(Whereupon the letter was produced.)

Q. Now, then, the other letter you wrote; you did write another? A. Yes, sir.

Q. That was to California?

A. Yes, to Mr. Liner.

Q. Have you a copy of that letter you wrote to California? [41]

A. I might add that Mr. Etter wrote that.

Q. That was a form letter?

A. Not on our stationery, it was one that we helped Mr. Casey draft?

(Testimony of William Cullen.)

Q. Now, these two letters,—what are the exhibit numbers?

A. The letter to Fred G. Huntington is exhibit 8 and the one to Irving M. Liner is exhibit 9.

Q. Exhibit 8 was written because of some confusion or it was thought there would be some confusion in the advertising, or caused by the advertising in the Billings paper, involving the operation of the Sulphur Springs Gypsum Company?

A. No, sir, it wasn't.

Q. What was that?

A. It was signed by the Wyoming Mineral Products Company which was,—Mr. Casey told us, his Company.

Q. That letter was written on behalf of the Wyoming Mineral Products Company?

A. And Mr. Casey.

Q. You know the Wyoming Mineral Products Company is a corporation?

A. Yes, sir.

Q. And the letter was for the corporation?

A. And Mr. Casey. [42]

Q. Did you bill the Wyoming Mineral Products Company?

A. No, sir, I included it in the work for Mr. Casey.

Q. Did you bill Mr. Casey for that?

A. No, sir.

Q. The letter to Mr. Liner was on behalf of the Sulphur Springs Gypsum Company?

A. Mr. Etter wrote that letter, I understood from Mr. Casey that it was for him.

(Testimony of William Cullen.)

Q. What did he tell you?

A. He told us Mr. Adams had been cited down by the Probation Board and he had to make some payment on this note, that the Sulphur Springs Gypsum Company,—that he wanted to pay some money on it so Adams would not be sent back to jail?

Mr. Young: We move to strike that as not responsive.

The Court: It may stand.

Q. The fact is that the Sulphur Springs Gypsum Company was making a payment to some of the creditors of Mr. Adams down in California?

A. They had done, but not since this Board of Directors took over.

Q. The purpose was to assure the creditors that the Sulphur Springs Gypsum Company would make this payment; that it was undergoing a reorganization,—isn't that correct? [43]

A. That is not the way I understood it.

Mr. Young: I offer exhibits 8 and 9 in evidence?

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Young: This is a letter dated April 13, 1948, over the signature of W. L. Casey, addressed to Mr. Irving M. Liner, Latham Square Building, Oakland, California. "Re. H. J. Adams and Adult Probation Department County of Alameda.

"Dear Sir,—This will advise that a new Board of Directors went into office on the 17th day of

(Testimony of William Cullen.)

December, 1947. The New Board has spent considerable time securing a full accounting during this change-over, of the company's bills, potential income, assets, liabilities, etc., following and during which the office of the Company has been moved to Spokane, Washington.

"Inclosed herewith you will find a check for \$500.00 which is sent at this time for application upon the note involved."

"The Company has not been able to work at capacity during the winter months, chiefly due to weather conditions, and for that reason income has been light. There is, however, an increased demand for the product and the company expects to become increasingly busy. You are now probably [44] aware of the fact that an option contract has been executed to dispose of the assets of the Sulphur Springs Gypsum Company and when this is done it is expected that payment will be made in full. Yours very truly"

Q. Now, isn't it a fact that this letter exhibit 9 was prepared and written on behalf of the Sulphur Springs Gypsum Company. There is no question about that is there?

A. I think it was written for Mr. Casey.

Q. For him individually?

A. That is what I think.

Q. The only information is what is contained in the letter?

A. And what he told us.

Q. Mr. Casey was at that time a member of the

(Testimony of William Cullen.)

Board of Directors of the Sulphur Springs Gypsum Company? A. He was.

Q. The second letter for which compensation is claimed is—strike that,—Mr. Huntington was representing the buyer of the Sulphur Springs Gypsum Company?

A. He represented Mr. Adams.

Q. Mr. Adams and the purchaser or purchasers of the Sulphur Springs Gypsum Company?

A. That is correct.

Mr. Young: Exhibit 8 is as follows:

“April 28, 1948” addressed to Mr. F. G. Huntington, Attorney at Law, Billings, Montana. [45]

“Dear Mr. Huntington,—Mr. W. L. Casey of the Wyoming Mineral Products Company has brought in to our office a copy of an advertisement purportedly inserted by the Wyoming Mineral Products Company in the Billings paper. This Advertisement was entirely unauthorized by the company and grossly misrepresents several facts. The board of directors of the Sulphur Springs Gypsum Company met on Monday and they, too, are concerned about this advertisement as it vitally affects the product which they are mining and having distributed. It is our understanding that this advertisement must have been placed in the paper by Mr. Adams in view of the fact that the box number given was one which he uses when he is in Billings.

“The people whom we represent are also further concerned because the Anderson Brothers, from

(Testimony of William Cullen.)

Thermopolis, Wyoming have reported to them that Mr. Adams personally told them he was moving a new contractor on to the property and they could leave their machinery and get out. Of course, this is not the intention or the purpose of the contract of March 23rd and it is certainly not our understanding of the actions to be taken by Mr. Adams. We would like to have some explanation of the above actions because as far as the people whom we represent here in Spokane are concerned, they have done everything to carry out the terms [46] of this contract in good faith. Contrariwise, Mr. Adams' actions would indicate either a lack of intelligent procedure or a distinct breach of good faith.

“Please give this matter your immediate attention and let us hear from you at your early convenience. Very truly yours, Cullen & Etter, By William E. Cullen.”

Q. Now, that letter was written at the time you were employed by the Sulphur Springs Gypsum Company, was it not, April 28?

A. It was at the time we were employed by the individuals.

Q. You also had employment from the Sulphur Springs Gypsum Company?

A. We had prior to that time.

Q. Incidentally, was that letter written before you went to Billings?

A. Just prior,—as a matter of fact the letter was never sent.

(Testimony of William Cullen.)

Q. The letter never left your office?

A. That is correct.

Q. Following the date of that letter, the Sulphur Springs Gypsum Company made available to you the sum of \$150.00 to go to Billings?

A. That's right, to take over their books and records.

Q. Do you know how many stockholders the Sulphur Springs Gypsum Company had?

A. No, I don't know exactly, I would say about forty. [47]

Q. That is your estimate, about forty.

A. Yes, I would think so.

Q. If I were to tell you that they had fifty-one, would that seem out of line?

A. That would seem all right.

Q. Do you know that Mr. Adams settled with all the stockholders exactly on the same basis that your clients were settled with?

A. No, I don't know myself.

Q. Now, you say that Mr. Casey received a certain amount of money; tell me again the amount of money he received?

A. I understood from Mr. Casey that he received forty thousand dollars in cash—a little over forty thousand about the 29th of April or the 30th of April before we went to Montana and at that time I found out in Montana that he received a ten thousand dollar note signed by Mr. Adams and Simanton and while I was in Montana he received a check for \$16,800 and a two thousand dollar note from Adams alone.

(Testimony of William Cullen.)

Q. He received all this from Adams?

A. No, he didn't receive it all from Adams.

Q. Did you know that he had a chattel mortgage——

A. ——He received it from the same people I received the money from, for the people we represented.

Q. Did you know that Mr. Casey had a chattel mortgage on machinery to him from the Anderson Brothers, in the principal [48] sum of \$36,000.00; did you know that?

A. I thought it was for \$26,000.00 but I knew he had a second mortgage on the machinery.

Q. Did you know that a corporation he owned controlling stock in, the Wyoming Mineral Products Company had the contract for all the fertilizer produced by the Sulphur Springs Gypsum Company for the entire United States?

A. I knew he had a contract to sell the sulphate.

Q. And that his contract covered the United States?

A. I knew that he covered all but a small portion.

Q. Did you know that he had books of account, advertising matter and other records pertaining to sales of this product that was involved in this transaction that he was required to turn over to the purchasers of the Sulphur Springs Gypsum Company?

A. Yes, I knew that.

Q. Did you know in order to get this transac-

(Testimony of William Cullen.)

tion through so that your clients could be benefited he had to part with all this evidence of security and property and take in exchange therefor, notes, which even today have not been paid?

A. I didn't know that he had not been paid, but I knew that he did that.

Q. How much of this do you think he had to take in notes?

A. \$12,000.00; I only know what he told me on that subject. [49]

Q. Mr. Casey occupied a substantially different position than the remainder of the signers of exhibit 5. They were small stockholders?

A. Some were stockholders, some had royalty assignments. I would say everyone was in a little different position than everyone else.

Q. Mr. Keinholtz had a claim for \$17,500.00 for stock he bought?

A. Some was stock and some money he advanced to Adams.

Q. How much was stock and how much was money advanced.

Mr. Hawkins: I object to this as immaterial.

The Court: I was wondering what the materiality of it was.

Mr. Young: It goes to the reasonableness of the statement of the witness that Casey agreed to pay thousands of dollars in attorneys fees.

The Court: I cannot see the materiality of it any more than work for any other clients they might have had. I have permitted a very wide

(Testimony of William Cullen.)

latitude as to the amount of work done. I cannot see that it is material but you may go ahead.

Q. Essentially the other claimants you represented, their claims represented stock they had in the Sulphur Springs Gypsum Company, and the agreement that if they were not satisfied they would have their money returned with six per cent interest? [50]

A. Yes, either in the Company or advanced to Adams.

Q. You were unable to look over the C P A audit and say what legal work or services were required?

Mr. Hawkins: That is going back to the work paid for.

The Court: When he asked about the five hundred dollars paid I didn't think it was material, I think the fact that he may have been paid five hundred dollars is entirely immaterial; I think the only question here is whether Mr. Casey owes the plaintiffs anything. However, the jury is here to pass on this. You may go ahead.

Q. Now, Mr. Cullen did you prepare any opinion or submit any opinion on the examination of this audit. A. Yes sir, orally.

Q. An oral opinion? A. Yes sir.

Q. You have never billed Mr. Casey for any sum of money for attorneys fees?

A. No sir.

Q. You have never written any letter stating

(Testimony of William Cullen.)

that you owe us a certain amount of money as attorneys fees arising out of the Sulphur Springs Gypsum Company matter or anything like that?

A. I have never written him at all.

Q. He never agreed to pay you any money? [51]

A. Yes, he agreed to pay us.

Q. The agreement that you rely upon is some statement that he made in Billings, Montana, "I will pay you several thousand dollars"?

A. That's right, he repeated that.

Q. When he got back he said he would pay you several thousand dollars. Do you know how many thousand he was going to pay you?

A. No, we were to see about that when he came in.

Q. Did you have in mind how many thousand he owed you?

A. I had in mind negotiating to see what was reasonable.

Mr. Young: I think that is all.

Redirect Examination

By Mr. Hawkins:

Q. About the 6th of March 1948 there being present Mr. Etter, Mr. Keinholz, Mr. Casey, Mr. Davis, Mr. Busch and yourself, were these four men, Mr. Keinholz, Mr. Busch, Mr. Casey and Mr. Davis, advised that you could no longer proceed in the name of the corporation on behalf of their interests? A. Yes sir.

(Testimony of William Cullen.)

Mr. Young: We object to that as repetition.

The Court: He has answered and the answer may stand.

Q. After you so advised them, did you advise them that you would be willing to appear for them individually from [52] that point on?

A. Yes sir.

Q. Did they agree to that representation, each and every one of them?

Mr. Young: He can say what was said and done, but not his opinion.

The Court: I think that is right.

A. We told them that they would have to proceed as individuals if they wanted to collect back the money they had given to Adams or put in the corporation. We asked each one if it was agreeable and each one of them said "yes".

Q. You said it was necessary to stand the expenses necessary?

A. We told them we would charge them individually from that time on.

Q. Was that in this conversation?

Mr. Young: We object to this, it antedates exhibit 5.

The Court: Objection overruled.

A. Yes, it was.

Mr. Hawkins. That is all.

Mr. Young: Nothing further.

R. MAX ETTER

Called as a witness on behalf of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins: [53]

Q. Where do you reside Mr. Etter?

A. I reside in Spokane, Washington.

Q. Are you a licensed practicing attorney?

A. Yes sir, for thirteen years I have been.

Q. Have you continuously followed your profession during that period?

A. Yes, with the exception of two years in the United States Navy.

Q. What official public positions have you held?

A. I was assistant prosecutor in Spokane County and——

Q. ——How long in that capacity?

A. One and a half years.

Q. Now, any other office?

A. I was appointed Assistant United States District Attorney for the Eastern District of Washington.

Q. And were you in the Attorney General's office?

A. I was assistant attorney general and on three occasions appointed as special State prosecutor.

Q. Did you ever have any experience with matters involving stock fraud cases?

A. Yes, I was assigned as states attorney to license violations and stock irregularities and viola-

(Testimony of E. Max Etter)

tions and the work of the S E C and mail fraud cases. I was likewise assigned to banking embezzlement transactions and cases having to do with that. [54]

Q. Did you become acquainted with the practice before the Securities and Exchange Commission?

A. Yes, a great deal more than one in the ordinary practice of law.

Q. When did you go back to private practice?

A. I was in private practice prior to the time I was in the prosecutor's office and since then for the past three years.

Q. Have you handled many matters in civil capacity? A. Yes, sir.

Q. Such matters as we have mentioned?

A. Yes, sir.

Q. Did you confer with the Securities and Exchange Commission representative on this case?

A. Yes, sir, both in Spokane and in Seattle.

Q. You made a trip to Seattle for that purpose?

A. Yes, sir.

Q. And conferred with the S E C office there?

A. Yes, sir.

Q. What is the name of the man in Spokane representing the Commission?

A. Mr. Denny is there a good deal of the time and Mr. Stocking in Seattle.

Q. Did you go over the books of this corporation? A. Yes, sir. [55]

(Testimony of E. Max Etter)

Q. Studied the royalty contracts referred to?

A. Yes, sir.

Q. You know Mr. Casey? A. Yes, sir.

Q. Do you recall him coming to your office in connection with this case? A. Yes, I do.

Q. In the first instance he came in what capacity?

A. The first time I heard of this was by telephone from Mr. Myers, he worked in Mr. Casey's office as I understood Mr. Casey. The next time I think I talked to Mr. Casey it had reference to a request for my attendance in the Spokane Hotel of a meeting of this Board.

Q. Did you attend that meeting?

A. I did not.

Q. You asked Mr. Cullen to attend, did you?

A. I did.

Q. Did you talk to Mr. Casey later?

A. I did.

Q. Was he there as a director of the corporation or an individual?

Mr. Young: Objected to as calling for a conclusion.

The Court: He may answer if he knows.

A. Mr. Casey, Mr. Busch, Mr. Davis and Mr. Keinholz talked [56] to me and Mr. Cullen in my office as a Board of Directors of the Sulphur Springs Gypsum Company and so stated.

Q. Did you do some work for that Board of Directors? A. Yes, sir.

(Testimony of E. Max Etter)

Q. On termination of that work did you have any conference relative to private employment?

A. Yes, sir.

Q. Relate the conversation,—what transpired?

A. After Mr. Cullen and I had made a study of the corporate records and the audit we conferred with these gentlemen and at that time advised them of suggested procedure and we likewise advised them that these were our suggested procedures on behalf of the corporation and in the event they did not see fit to proceed with the corporate organization they would not be able to act as directors for the recovery of the individual sums which they represented to us were advanced for stock and loans and royalties, we advised them that there would be a violation of fiduciary capacity and in our opinion if they wished to do so they would have to proceed in individual capacities and we asked them if they agreed to employ us for that purpose.

Q. What was their reply?

A. After explaining it to those men as well as I remember I asked each one directly if they wished to proceed in that manner. [57]

Q. In what manner?

A. To employ us as attorneys in their personal capacity to recover their money.

Q. Was Mr. Casey present? A. Yes, sir.

Q. Did you ask him if he wanted to proceed on that basis? A. Yes, sir, each one of them.

Q. What was Mr. Casey's reply?

(Testimony of E. Max Etter)

A. He said he did.

Q. Was there any statement about compensation?

A. The statement was that the compensation that was to be paid would have to be paid by individuals.

Q. No signed contract was made?

A. No, sir.

Q. When was that with reference to this exhibit number 5?

A. Prior to that, about three weeks I would say, or maybe two weeks.

Q. Was that the conference that Mr. Cullen testified to that Mr. Casey, Keinholz, Davis and Busch were present? A. I assume that is correct.

Q. Was it the same one?

A. That's right, it was the same.

Q. You were at one such conference?

A. Yes, sir.

Q. You heard all Mr. Cullen's testimony concerning the writing [58] of certain letters and preparing certain documents? A. I did.

Q. Was his testimony substantially correct?

A. I would say so.

Q. Do you recall many conferences with Mr. Casey and his associates? A. A great many.

Q. Have all the letters written in connection with this been offered here?

A. No, I recall a letter brought in to me.

Q. Mr. Etter, handing you plaintiffs' exhibit 10, marked for identification, state what it is?

(Testimony of E. Max Etter)

A. That is a letter with a number of alterations in my handwriting which was brought in, typed by Mr. Cullen.

Q. The letterhead is Mr. Casey's company?

A. Yes, he brought in several sheets.

Q. Did you redraft and write another letter?

A. Yes, I did.

Q. Was that letter sent? A. Yes, sir.

Q. Did Mr. Casey express any concern about this matter?

A. He came in and told me that Mr. Adams was to make an appearance in California before the Adult Probation Department in the County of Alameda and he told me it was in connection with the matter previously discussed in [59] our office concerning a lease given by The Sulphur Springs Gypsum Company, or taken by them from some people in Wyoming and provided for payment by the lessees over to the lessors,—he said that this arrangement had been made by Mr. Adams and that the royalties,—that the lease provided for fifty cent royalty to Irving Liner and that Liner was to collect the royalties and pay to the Probation Department \$23,500.00 that Mr. Adams had incurred down there. He told me that Mr. Adams was on the way to California and that he desired Mr. Casey to send this letter and fifteen hundred dollars to the Probation Department in as much as he was to make this appearance; I advised Mr. Casey that the Board had previously told us that they had refused

(Testimony of E. Max Etter)

to recognize any payment under this particular obligation. Mr. Casey was concerned but didn't want to send any money on the ground that there had been a repudiation and the Board did not wish to confirm any arrangement made but we wanted to do something so that Mr. Adams could stay out,—this was Casey's idea, and I suggested that any letter written should be written by him individually and that any money should be sent by him or his company rather than the Sulphur Springs Gypsum Company and that I thought five hundred dollars would relieve any immediate necessity and if the deal went through Mr. [60] Adams could handle it and I therefore drafted this letter in a fashion I thought was necessary and forwarded it.

Q. Did the five hundred dollars go forward?

A. Yes.

Q. With this?

A. Yes and Mr. Casey brought this to our office.

Mr. Young: Did you offer that in evidence?

Mr. Hawkins: I offer it.

Mr. Young: No objection.

The Court: It may be admitted.

Q. Did you ever discuss with Mr. Casey the moneys collected,—strike that,—did you ever discuss with Mr. Casey, or did he ever say anything about the payment to be made to you or to the firm of Cullen and Etter?

A. Yes, sir, I talked to him once at that time,—I cannot recall whether it was before or after he

(Testimony of E. Max Etter)

had gone on a trip to California, I don't recall now whether it was before or after.

Q. Was it about the collection of this money?

A. Yes, sir.

Q. And was it after the collection had been made?

A. Yes, sir.

Q. What was the substance of that conversation?

A. I called Mr. Casey and asked if he was coming to our office to discuss the matter of an adjustment or compromise [61] of fees, and Mr. Casey said he had his money tied up in sacks or something like that, and as soon as he could he was coming down and settle with us.

Q. Did he say he was coming down and settle the fee with you?

A. He did say that, yes, sir.

Q. Mr. Etter, you were connected with this matter from some time in February until April or May?

A. Yes, sir.

Q. And familiar with all the steps and things done by your law firm?

A. I am familiar with that, although I didn't do all of this myself.

Q. Based upon your experience in cases of this kind and the work done and the results obtained and your special qualifications, can you express an opinion as to the reasonable value of the services rendered?

A. Yes, sir.

Q. What is that opinion?

A. I would say that the reasonable value of the service rendered is \$15,000.00.

(Testimony of E. Max Etter)

Q. What elements do you take into consideration?

A. I take into consideration principally the full amount of the recovery, with my experience in cases of this kind, this is the first time that I have ever seen recovery on a case of this kind. [62]

Mr. Young: We object to this; it is not responsive.

The Court: It is one of the factors he bases his opinion on. I think the last part of the answer may be stricken, that he had never seen recovery in this kind of case.

Q. How much money was recovered on behalf of your clients?

A. As I understand a hundred per cent recovery of all their money was made.

Q. Some interest?

A. Yes, sir, and some interest as I understand it.

Q. Mr. Casey represented to you,—what did Mr. Casey represent was the amount coming to him, in your office, Mr. Etter?

A. Mr. Casey represented to us that he had somewhere in the neighborhood of \$69,500.00 but he could not confirm that as the final amount until he went to Thermopolis, Wyoming, and discussed a second mortgage and other factors including his dealerships.

Q. As to the amount collected how much was Mr. Casey's?

(Testimony of E. Max Etter)

Mr. Young: We object to that. It is immaterial.

The Court: I think the percentage is immaterial.

Q. How much did you collect for Casey, do you know? [63]

A. I don't know except what I have been told by Mr. Cullen.

Q. What he testified to?

A. That is correct.

Mr. Hawkins: That is all, you may inquire.

Cross-Examination

By Mr. Young:

Q. Your first discussion of services to be rendered in connection with the preparation of the contract exhibit 5, you say, was had about two weeks prior to the date of the preparation of the contract?

A. I think so.

Q. At that time you had a verbal agreement as to what you would do by way of preparing a contract and what you would charge for the preparation of the contract?

A. A verbal agreement to do all steps necessary.

Q. Exhibit fourteen marked for identification, I will ask you if that is a statement on your statement form?

Mr. Hawkins: Hand it to him and ask what it is?

Q. What is it?

A. It appears to be a billing from our office.

Mr. Young: I offer it in evidence.

Mr. Hawkins: No objection except that it goes to

(Testimony of E. Max Etter)

the services for the Sulphur Springs Gypsum Company. [64]

The Court: I don't think it is material but we have had so much of it we might as well put this in too.

Mr. Young: This is on a form of Cullen & Etter, attorneys at law, 726 Paulsen Building, Spokane 8, Washington. Dated March 10, 1948. To Sulphur Springs Gypsum Company, East 3044 Trent Avenue, Spokane, Washington. Retainer for services, per verbal Statement, agreed 3/6/48 \$500.00. Pd 3/16/48.

Mr. Hawkins: That is not all that states, it states it was paid March 16, 1948.

Mr. Young: I read, "paid -pd- 3/16/48.

Q. The initial Board of Directors of the Sulphur Springs Gypsum Company that you dealt with comprised the new Board?

A. That is correct.

Q. That Board was interested in working out a solution of the problem which it had with Mr. Adams who owned the controlling interest in that corporation?

A. There were numerous problems.

Q. That was the primary problem?

A. Mr. Adams was, yes, that is correct.

Q. It was thought that Mr. Adams should be approached to secure from him a trust agreement involving his stock so that it would be tied up in such a way that activity [65] of the new Board would not be hampered with?

(Testimony of E. Max Etter)

A. That is correct, that is part of it.

Q. Mr. Adams was brought to your office?

A. Are you referring to the time of the work for the Sulphur Springs Gypsum Company?

Q. Chronologically, the work that led up to exhibit 5? A. That is substantially correct.

Q. Mr. Adams refused to enter into a voting trust agreement but he made the Board of Directors of the Sulphur Springs Gypsum Company a proposition whereby he would secure a buyer for their stock and their claims provided they would agree as to the amount of their claims and give him six months in which to do it?

A. Mr. Adams didn't make the proposition.

Q. Who did?

A. We made the proposition to Mr. Adams.

Q. Mr. Adams agreed to put up as security,—good faith security fifty thousand shares of the stock of the Sulphur Springs Gypsum Company?

A. He agreed to do that, yes.

Q. On the other hand the people that had claims including members of the Board of Directors agreed as to the amount of their claims?

A. Yes, and Mr. Adams agreed to other things.

Q. That is correct to this point?

A. That is right. [66]

Q. Now, in addition, Mr. Adams either willingly or was forced to agree to pay attorneys' fee?

A. I don't recall that Mr. Adams was forced to pay attorneys' fee.

(Testimony of E. Max Etter)

Q. He agreed to pay attorneys' fee as a part of this contract?

A. The language indicates that.

Q. Mr. Etter, according to exhibit 5, Mr. Adams had six months to perform his part of the contract?

A. That is correct.

Q. Do you recall when the discussion of attorneys' fee came up Mr. Adams made a special point of that, asking what you would demand by way of attorneys' fees and you and Mr. Cullen excused yourselves and came back and told him what you would expect as attorneys' fees?

A. I don't recall that.

Q. You don't recall that?

A. I certainly do not.

Q. Each of the parties that signed exhibit 5, which is the final contract, agreed to turn in to your office all evidence of indebtedness that they had or claimed by way of stock or notes or whatever they had by way of indebtedness?

A. That is right.

Q. In paragraph six, I think, of the agreement?

A. Yes, sir. [67]

Q. Mr. Casey didn't turn in stock or claims of indebtedness? A. No, sir, he didn't.

Q. It was specifically understood by all those who entered into this agreement, exhibit 5 as follows: "That this agreement shall be binding on each and every individual who signs the same, to the full extent of his obligation undertaken under

(Testimony of E. Max Etter)

the terms of this agreement, and no other.” That is your language? A. Yes, that is correct.

Q. You realized that you had to have a contract running to these people as individuals; you wanted to be sure that you had a contract that would cover your fees in handling matters of their claims ultimately under the terms of the contract?

A. I don’t think that is correct. The contract was between our clients and Mr. Adams, we didn’t represent Mr. Adams at any time.

Q. The people that you were representing were not to be bound by the contract unless they signed it? A. What was that again, Mr. Young.

Q. That no one was to be bound by this contract unless they signed it?

A. The intent was to get Mr. Adams’ signature; that was the express request made by all these people.

Q. Mr. Adams did sign the contract? [68]

A. Yes, sir.

Q. He returned it to your office?

A. Yes, sir. I think he signed it in our office in the presence of his counsel, although I might be mistaken in that.

Q. Was Mr. Casey present when he signed the contract? A. I don’t recall.

Q. You were informed by Mr. Adams that Casey wouldn’t sign the contract?

A. No, sir, he didn’t inform me that he wouldn’t sign.

(Testimony of E. Max Etter)

Q. Didn't Mr. Adams inform you that Casey wouldn't sign the contract?

A. He had some discussion with Mr. Cullen but he didn't inform me.

Q. Have you been informed by Mr. Cullen that Mr. Adams told him that Casey wouldn't sign the contract?

A. No, I never was informed that he wouldn't.

Q. You never got Mr. Casey's signature on the contract?

A. We never requested it, Mr. Young.

Q. Calling your attention to exhibit 6, you received, some time in April, that exhibit, did you not?

A. Mr. Cullen received it, I have seen it in the office.

Q. You knew at that time, when you received that exhibit that Mr. Casey was dealing individually with Mr. Adams and the other people involved in this transaction?

A. I did not know it. I didn't understand it as such. Mr. [69] Casey was in our office many, many times after we received this.

Q. Did you ever hear he was proceeding individually without consulting you?

A. I didn't discuss it with Mr. Casey.

Q. Did any member of your firm discuss it with Casey?

A. I think Mr. Cullen discussed it with Mr. Casey.

(Testimony of E. Max Etter)

Q. Did you get the impression that Mr. Casey was handling his matters individually without regard to any contract you had?

A. No, absolutely not.

Mr. Young: This is exhibit 6. "March 23, 1948. To Whom It May Concern,—L. W. L. Casey, representing myself to be the principal owner of the Wyoming Mineral Products Co., a corporation of the State of Washington, for the consideration of One Dollar receipt of which is hereby acknowledged, do hereby agree to sell to H. J. Adams, his heirs or assigns, all personal and corporation claims against the Sulphur Springs Gypsum Company, a corporation of the State of Wyoming and all personal or corporation claims against H. J. Adams, for the sum of Fifty-two thousand dollars, together with interest at the rate of six per cent from March 23, 1948, the payment of this sum of money to be made within six months from date hereof, otherwise [70] this agreement shall be null and void.

"The sum mentioned above shall be in full payment of any and all obligations given to me heretofore by the Sulphur Springs Gypsum Company of Thermopolis, Wyoming, H. J. Adams, of Spokane, Washington, and Anderson Brothers Contractors, of Thermopolis, Wyoming, and shall include a certain note of face value of \$15,000.00 issued to W. L. Casey and C. W. King by the Sulphur Springs Gypsum Company of Thermopolis,

(Testimony of E. Max Etter)

Wyoming, a certain assignment of fifty cents per ton, issued by Anderson Brothers, Contractors, a certain second mortgage issued by Anderson Brothers, Contractors, of Thermopolis, Wyoming, in the sum of \$26,000.00 more or less; also the business goodwill, contracts and assignments of the Wyoming Mineral Products Company, of Spokane, Washington.

“It is mutually understood that contracts now in effect with agents and representatives of the Wyoming Mineral Products Company, shall be honored in full by H. J. Adams, his heirs or assigns.

“W. L. Casey further agrees to surrender 26,000 shares of stock in the Sulphur Springs Gypsum Company.

“It is also understood that W. L. Casey is to be paid for material and equipment purchased for the operation of marketing soil sulphate subsequent to this date in addition to the purchase price hereinabove mentioned.” [71] That is signed W. L. Casey, Wyoming Mineral Products Company, Inc., by W. L. Casey and witnessed by C. W. King of Bonners Ferry, Idaho.

Q. When that agreement was called to your attention you knew that Mr. Casey was acting individually in the matter of protecting his interest and making his transaction with Mr. Adams for all of the subject matter involved in this contract exhibit 5?

A. No. I might offer further explanation: When

(Testimony of E. Max Etter)

Mr. Casey—when it was decided that this transaction would be closed in Montana it was suggested by Mr. Busch that the different instruments and articles that were held by Cullen and I should be sent to Montana, Mr. Casey protested and insisted that I go to Montana; he wanted me to go; he wanted to be sure that he got everything he had coming; he was dealing with certain people that some called rather shrewd. I was unable to go because of other business that kept me here and Mr. Cullen went over.

Q. Mr. Casey had made his contract with Adams sometime in the fore part of April, 1948?

A. I don't know what he had done with Mr. Adams.

Q. This exhibit 6 is dated the 23rd of March, 1948?

A. That's right. It has been testified to here that it was actually entered into around the 5th of April, 1948. That [72] is correct, it is dated the same day as the master contract.

Q. Now, Mr. Casey had entered into his contract with Mr. Adams, this exhibit 6?

A. I don't know what he had to do with Mr. Adams separately.

Q. When you received that around the first of April you knew that Mr. Casey was dealing individually with Mr. Adams?

A. We did not, and were not so informed.

Q. Take the combination of the two things,—Mr. Casey's refusal to sign—

(Testimony of E. Max Etter)

A. —Mr. Casey didn't refuse to sign.

Q. Well, his failure to sign and this exhibit coming to your attention that he was dealing directly with Mr. Adams, didn't it occur to you that you should take it up with Mr. Casey and see if you should have a right to contract his business?

A. It didn't occur to me at all.

Q. It didn't occur to you at all?

A. No, sir, it didn't.

Q. You had nothing to do with the preparation of exhibit 6? A. No, sir.

Mr. Young: That is all.

Redirect Examination

By Mr. Hawkins:

Q. Referring to this exhibit, does it bear the signature of Mr. Adams?

A. No, it doesn't.

Q. The only signature it bears is what?

A. Mr. Casey's, and witnessed by another gentleman.

Q. It is signed by him individually and in his capacity in the Wyoming Mineral Products Company? A. That is correct.

Q. Did you consider yourself as attorney for Mr. Casey throughout all these proceedings?

Mr. Young: We object to what he considered himself, it would be a conclusion.

The Court: It may be a conclusion, but I think generally an attorney knows whether he is attorney for a person, just as a Doctor must know

(Testimony of E. Max Etter)

whether he is a person's physician, but I don't know how you would get that in evidence.

Q. There was some reference to exhibit 8 which Mr. Cullen said was not sent out, you are familiar with that? A. Yes, sir.

Q. Do you know why it wasn't sent out?

A. Yes, sir.

Q. Why?

A. Mr. Casey requested us not to send it, he didn't want to interfere with these proceedings, they were nearing conclusion.

Q. Were you ever employed by Mr. Adams? [74]

A. No sir.

Q. Was he ever a client of yours?

A. Never was, no, he never has been.

Q. Was he obliged to pay you?

A. I don't know anything about it if he ever has.

Q. My question was—was he obliged to?

A. No sir.

Mr. Hawkins: That's all.

Recross Examination

By Mr. Young:

Q. What do you mean by the language of this contract, "the said party of the first part", that is Mr. Adams? A. That is correct.

Q. "The said party of the first part does also agree that the law firm of Cullen and Etter, 726 Paulsen Building, Spokane, Washington, shall represent and shall perform all such services as may

(Testimony of E. Max Etter)

be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the part is of the second part and relative to the operating during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in trust, if offered, other claims for payment by said party of the first part, including shares of stock in the said Sulphur Springs Gypsum Company, notes signed by the company or the first party, or other evidences of [75] indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of not less than \$4,000.00 subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement.” What do you mean that you had no agreement, I understood you to say you had no agreement,—what do you mean when you say you had no agreement with Mr. Adams for attorneys fees when in paragraph 12 you agree with him and name the amount.

A. Do you want me to explain it?

Q. I am not asking for any explanation, it is right there.

The Court: You may explain.

(Testimony of E. Max Etter)

A. We drew three drafts of this contract in which no reference was made to such a thing. Mr. Huntington came and said he had a substantial claim, that he had performed services in the amount of thirty-five hundred dollars and had other work to do and that he thought he would be entitled to have and insisted that the Company or the contracting parties accept the obligation. Our clients refused to do that, and after a discussion in our office,—I think Mr. Casey was there,—I know it included two or three directors and was over a period of a couple of hours, and our people refused that demand. Mr. Cullen suggested that some clause be put in, that the clause be inserted and that it be four thousand dollars against whatever might occur.

Q. But the contract does provide for attorneys fees?

A. Yes sir.

Q. There is no question about that?

A. No, there isn't.

Mr. Young: That is all.

Mr. Hawkins: That is all.

The Court: We will recess for ten minutes at this time.

November 23, 1948, 3:30 P.M.

FRANK H. DAVIS

Called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Your name is Frank H. Davis?

A. Yes sir.

Q. Where do you reside?

A. Spokane, Washington.

Q. What is your occupation? [77]

A. Hay, grain and feed.

Q. Are you the Mr. Davis referred to in the testimony in this case? A. Yes sir.

Q. Referring to a time after Cullen and Etter had examined the books and the audit do you recall that they made a report to you? A. Yes sir.

Q. Were you a director of the Sulphur Springs Gypsum Company. A. Yes sir.

Q. Where were you when you received this report from Cullen and Etter?

A. In their office.

Q. Who else was present?

A. The rest of the Directors.

Q. Was Mr. Casey present?

A. All the Directors except one?

Q. Was Mr. Casey there?

A. Yes sir.

Q. Mr. Keinholz? A. Yes sir.

Q. Mr. Busch? A. Yes sir.

Q. And yourself? A. Yes sir. [78]

Q. After they made their report to you con-

(Testimony of Frank H. Davis.)

cerning the affairs of the corporation do you recall what conversation followed?

A. They told us we would have to proceed as individuals.

Q. That you would have to proceed as individuals? A. Yes sir.

Q. And not as directors of the corporation?

A. Yes sir, that's right.

Q. Were you asked if that was agreeable?

A. Yes sir.

Q. Who asked you that? A. Mr. Etter.

Q. What was your reply?

A. That it was agreeable.

Q. Did he ask Mr. Casey? A. Everybody.

Q. And what were their replies?

A. That it was agreeable with everybody.

Q. Was anything said about who would have to pay for the services?

A. That we would have to pay individually. We were hiring them individually.

Q. Did that relationship continue down to the time you collected the balance of your money?

A. Yes sir. [79]

Mr. Hawkins: That is all, you may examine.

Cross Examination

By Mr. Young:

Q. Was it discussed that the contract would be drawn covering the fee arrangement?

A. No, we said it would be taken out individually and not as a group.

(Testimony of Frank H. Davis.)

Q. So that those who wanted to enter into the contract could and those who didn't, didn't need to enter into the contract?

A. We were all to stand as one.

Q. Was there a written contract at that time?

A. No sir.

Q. The written contract was prepared later?

A. I don't remember of any, I don't know which contract you mean?

Mr. Hawkins: I object to the cross examination as improper, it is not within the scope of the direct examination of this witness.

The Court: Sustained.

Q. Was there any,——

The Court: ——Just a minute Mr. Young. This contract is really not before this Court as a contract, on the objection of counsel I admitted it in a limited way. I sustained counsel for the defendant [80] and the admission of this contract was only for the purpose of showing the amount of work involved here by these plaintiffs. There has been a lot of evidence here without objection, but this contract is in here only to show the amount of work and it has no effect whatever except to show the amount of work.

Q. Was there any discussion as to the amount of compensation for those services?

A. No sir.

Q. You didn't know whether it would cost one dollar or a hundred dollars? A. We did not.

(Testimony of Frank H. Davis.)

Q. What were the services to consist of?

A. Recovering our money.

Q. How was that to be done?

A. I wouldn't know. That was our lawyer's work.

Q. Was there a discussion of attorneys fees in your presence? A. No sir.

Q. Was Mr. Adams present during the discussion? A. Yes sir.

Q. Was Mr. Adams present during this discussion that you had with the attorneys,—you know Mr. Adams? A. Yes sir, I do.

Q. Was he present? A. Most of the time.

Q. You don't recall any discussion about fees?

A. No sir.

Q. Fees could have been discussed and you would not remember it, you think?

A. I think not, I remember pretty well.

Q. There wasn't any reference to a four thousand dollar fee to be paid by Mr. Adams.

A. No sir.

Q. Or anyone in the group? A. No.

Q. Did anyone there appear to be interested as to what the cost of the service was to be?

Mr. Hawkins: We object to the form of that question.

The Court: The question should be as to what was said.

Q. Did anyone in the group say anything with respect to attorneys fees or what the cost of the service was to be? A. Nobody, at any time.

(Testimony of Frank H. Davis.)

Q. No one made any expression?

A. I just wondered about it.

Q. Do you know of any other individual who wondered what the fee was to be?

A. Yes sir, me. [82]

Q. Yes, I understand, but you didn't make inquiry about it.

A. No.

Q. What did you hear,—strike that please,—you didn't hear anyone else make any inquiry?

A. No sir.

Q. Were you present when Mr. Adams made a contract, or agreed to deliver fifty thousand shares of stock as good faith performance bond?

Mr. Hawkins: We object, it is beyond the scope of the direct examination.

The Court: Yes, unless you desire to make him your witness?

A. I don't desire to do that.

Q. Did you leave the office of Cullen and Etter ahead of the other members of the Board of Directors of the Sulphur Springs Gypsum Company?

A. No sir.

Q. You were there during all of the time?

A. Yes sir.

Q. Did you attend other meetings that Mr. Adams was at with the Board of Directors in the office of Cullen and Etter?

Mr. Hawkins: Objected to as beyond the scope of the direct examination.

The Court: Sustained. [83]

(Testimony of Frank H. Davis.)

Mr. Young: I will make him my witness for this one question.

The Court: We will wait until you put on your case in chief, if you desire to make him your witness you may call him then.

Mr. Young: I cannot proceed further on this because of this question.

The Court: Do you have further redirect.

Redirect Examination

By Mr. Hawkins:

Q. Was Mr. Adams present at the time of this conversation which you mentioned at which Mr. Davis, or rather Mr Casey, Mr. Keinholz, Mr. Bush and yourself were present, this was a conversation about employing Cullen and Etter individually, you mentioned Mr. Casey, Mr. Keinholz, Mr. Busch and yourself,—was Mr. Adams there at that time?

A. Yes sir.

Q. He heard this conversation regarding the employing of Cullen and Etter?

A. Yes sir.

Mr. Hawkins: That is all.

Mr. Young: That is all.

ALBERT KEINHOLZ

Called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Where do you reside Mr. Keinholz?

A. Spokane, Washington.

(Testimony of Alfred Keinholz.)

Q. What is your occupation?

A. Farming.

Q. Referring now to a conversation occurring in the office of Cullen and Etter in Spokane, Washington, when you were advised and given a report by Cullen and Etter as to the result of an examination of the books and audit of the Sulphur Springs Gypsum Company, do you recall that time Mr. Keinholz?

A. Yes sir.

Q. Do you recall who was present at the time?

A. I think all the directors were present.

Q. You mean Mr. Busch, Mr. Casey, yourself and Mr. Davis.

A. That's right.

Q. After Cullen and Etter gave you their report what did they say about further representation?

A. Well, that it was a matter of individuals then, that we would act as individuals to get our money back.

Q. Were you to pay them?

A. We couldn't pay them any other way because we sent all the money the corporation had with the books so it was [85] individually.

Q. Have you discussed this matter of fees with Mr. Casey?

A. Yes sir.

Q. When and where?

A. Spokane.

Q. When with respect to the conversation you just testified to?

A. I think it was after he had his and we didn't get ours.

Q. After he had gotten his money in Montana?

(Testimony of Alfred Keinholz.)

A. It was concerning the settlement for which we were to pay, the fee we were to pay.

Q. What was the conversation?

A. He asked me to state that you fellows agreed to take Fifteen hundred dollars.

Q. He asked you to say that Cullen and Etter had agreed to take Fifteen hundred dollars?

A. Yes sir.

Q. What did you say?

A. I didn't understand it that way nor would I do business that way.

Q. Did he say anything further to you?

A. No, that cleared up the whole thing.

Mr. Hawkins: That is all, you may examine.

Cross Examination

By Mr. Young:

Q. Where did this take place? [86]

A. In the corridor of the Paulsen building and the office of the Wyoming Mineral Products Company at Trent.

Q. Who was present at this conversation?

A. Myself and Casey.

Q. Isn't this what was said? Mr. Casey said his understanding of the contract entered into with the firm of Cullen and Etter provided for payment of Two thousand dollars if Adams performed the contract within sixty days and that they would not be entitled to any attorneys fee other than provided in the contract?

A. I don't remember it that way.

(Testimony of Alfred Keinholz.)

Q. Could that not have been the thing that Casey was talking to you about?

A. I presume that it could be, but I don't remember it that way at all.

Q. For the purpose of refreshing your recollection further didn't Mr. Casey point out to you that the contract you signed with Mr. Adams provided for a limitation of attorneys fees and that you should not pay more than what was provided for in the contract, he pointed that out to you did he not?

A. That was just a few days ago, but not at that time.

Q. Didn't he, or could he not have, at the time he talked to you the first time, have called your attention to the fact that there was a limit as to the attorneys fees that [87] were to be collected by reason of the contract you signed?

A. I have no recollection of an agreement between Cullen and Etter and myself or the Company or any individuals wherein there was an amount set on the amount to be paid these boys for the collection of our money.

Q. I am asking if it were not a fact that Mr. Casey could have been referring to the limitation on the fees that was contained in the contract that you signed with Cullen and Etter?

Mr. Hawkins: Objected to as repetition, he has answered it.

The Court: Yes, but he may answer again.

(Testimony of Alfred Keinholz.)

A. I suppose it could have been that way but I don't remember it that way at all.

Mr. Young: That is all.

Redirect Examination

By Mr. Hawkins:

Q. You had \$17,500 involved in this matter?

A. Yes sir.

Q. Did you get it back? A. Yes sir.

Mr. Hawkins: That is all.

Recross Examination

By Mr. Young:

Q. And you paid three per cent—— [88]

Mr. Hawkins: Objected it is not proper cross-examination, it is not within the scope of the direct.

The Court: Sustained.

Mr. Young: That is all.

EDWARD J. LEHAN

Called as a witness on the part of the plaintiffs, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Hawkins:

Q. Where do you reside?

A. Spokane, Washington.

Q. Your profession or occupation?

A. I am a lawyer.

Q. How long have you been a lawyer?

A. Graduated June 1935 and admitted in September of that year.

(Testimony of Edward J. Lehan.)

Q. Been practicing continuously since that time?

A. With three and a half years out for the service.

Q. Are you acquainted with the law firm of Cullen and Etter? A. Yes sir.

Q. Your firm is of comparable size?

A. Yes sir.

Q. Comparable with them in style of practice?

A. Yes sir.

Q. Associated with them?

A. Not in business,—I have known Mr. Cullen and Mr. Etter [89] from the time we were all in school, I was formerly Chief Civil Deputy Prosecuting Attorney Spokane County at the time Mr. Etter was employed as deputy prosecuting attorney assigned to the stock fraud cases and I also knew him in the District Attorney's office. I had no association in the Attorney General's office although I served as Assistant Attorney General and was familiar generally with the files he had handled.

Q. Are you familiar with the reputation of the law firm of Cullen and Etter? A. Yes sir.

Q. What is its reputation? A. Excellent.

Q. Have you been present throughout these proceedings? A. Since Court convened.

Q. Have you heard all the testimony?

A. Yes sir.

Q. Including the testimony of Mr. Cullen and Mr. Etter? A. Yes sir.

Q. Taking into consideration all the evidence you have heard and being familiar with the ele-

(Testimony of Edward J. Lehan.)

ments taken into consideration in arriving at a fee,—are you familiar with the elements taken into consideration in arriving at fee? A. Yes sir.

Q. What are those elements?

A. They vary. In cases of this character the amount involved and the prospects of recovery at the outset are factors to be considered, then the time attending to conferences and work and advice. The most effective procedure for securing the desired end are factors to be considered, and in my opinion in this case——

Q. ——Mr. Lehan, would the loss of other business be an element to be considered?

A. Yes, loss of other business from devoting time to this case. The fact that a case of this kind requires immediate attention is a factor.

Q. Would the skill and reputation of the attorneys be an element for consideration?

A. Yes sir, and in that connection I am of the opinion that Mr. Etter's experience was of considerable value, and an estimation of Mr. Cullen's abilities could be summed up by saying that I think he is a capable and able lawyer.

Q. Are those all the elements?

A. No. I would consider further the practice of the Spokane County Bar Association, the community in which we practice with respect to contingent fees, it is the general practice matters taken on a contingent basis are taken in this way: twenty-five per cent of any recovery effected by correspon-

(Testimony of Edward J. Lehan.)

dence or consultation, the client to pay all necessary costs; one-third in the event it is necessary to institute civil proceedings in the Superior Court and prosecuting that to a conclusion.

Q. Are those all the factors that you took in consideration?

A. I considered the excellent results obtained in this instance.

Q. In the light of those conditions and the elements what is your opinion as to the reasonable value of the services rendered by Cullen and Etter for Mr. and Mrs. Casey.

A. The same as expressed by Cullen and Etter; that fifteen thousand dollars would be a reasonable sum in the light of the recovery and the other factors. I would qualify that if it was across the table dispute, if I were involved I would negotiate on the basis of \$12,500.00.

Q. Have you ever made any expression of opinion as to the attorneys fees involved in this action?

A. No sir.

Q. To Mr. Cullen, Mr. Etter or myself?

A. No, and not to any other individual.

Mr. Hawkins: That is all.

Cross Examination

By Mr. Young:

Q. The matter of recovery is important to take into consideration in arriving at a contingent fee. What amount are you taking into consideration in arriving at this contingent [92] fee?

(Testimony of Edward J. Lehan.)

A. My understanding so far is that a sum approximating seventy thousand plus has been recovered for Mr. Casey.

Q. Seventy thousand dollars plus?

A. That is right.

Q. Would you take into consideration the fact that Twenty-six thousand of that was represented by a chattel mortgage covering machinery of ample value to protect the mortgagee and act as security for the mortgagee, would you take that factor into consideration, assuming that to be a fact, would you take that into consideration in arriving at a fee?

A. It wasn't my understanding from the evidence.

Q. I am asking you to assume that as true, then that would have some bearing?

A. The fact that he accepted a chattel mortgage.

Q. Assuming that he had been secured prior to the negotiations by the plaintiffs, to the extent of twenty-six thousand dollars, that would enter into your conclusion as to a reasonable amount of the fee?

A. If I am to assume there was a chattel mortgage, I am also to assume that he was secured with a chattel mortgage.

Q. Assuming as a part of the seventy thousand dollars plus they recovered for Mr. Casey that he had, before any employment was undertaken by the plaintiffs, security for \$26,000.00 of that sum? [93]

A. I understand what you are asking.

(Testimony of Edward J. Lehan.)

Q. What effect would that have?

A. Would that be a first or second mortgage?

Q. A first mortgage.

A. I would assume if that is the case that there was ample security for the indebtedness and that consideration should be given to it.

Q. How much consideration would you give it?

A. That goes to the realm of speculation. I would want to know whether he was satisfied with his security.

Q. Assume that he was, that he had ample security.

A. And wished to collect the difference between the \$26,000.00 and the \$70,000.00?

Q. That he was required to put it up in settling his dealings with other parties——

A. ——So that the net recovery would be seventy thousand?

Q. That is right.

A. Then I would compute it on the same basis that we compute collections, twenty-five per cent without dispute.

Q. Then assume that Mr. Casey had a franchise for the sale of the product of this corporation, the business and good will, and was yielding that as a part of the consideration flowing from him to the party paying the seventy thousand dollars, would you take that into consideration in arriving at the reasonable value of the fee? [94]

A. I don't know what value those matters or rights have?

(Testimony of Edward J. Lehan.)

Q. And you would have to know that before you could arrive at an opinion as to the reasonableness of the fee?

A. My opinion was based on the evidence I heard.

Q. Assuming that in addition to surrendering the chattel mortgage covering machinery that Mr. Casey also surrendered a franchise to sell this product in the entire United States, together with the good will that he had built up over a period of time,—you would have to know the value of that business before you knew whether he actually received anything?

A. You would have to know, of course.

Q. And without that information you could not determine what a reasonable fee would be?

A. I have expressed an opinion on the evidence I heard.

Q. Assuming as a part of the transaction Mr. Casey took notes of questionable value in the sum of \$12,000.00, you would have taken that into consideration?

A. That's right.

Q. And without that information you wouldn't render an expert opinion?

A. I could assume that he would only accept notes that there was every prospect of payment on.

Q. Reasonable men have bad notes?

A. That is correct. [95]

Q. Did you examine any briefs written by the firm of Cullen and Etter?

Mr. Hawkins: Objected to as there is no testimony of briefs being prepared?

(Testimony of Edward J. Lehan.)

A. I did not.

The Court: He has answered now, and the answer may stand.

Mr. Young: That is all.

Redirect Examination

By Mr. Hawkins:

Q. Your opinion is based on the evidence you have heard here? A. That is correct.

Mr. Hawkins: That is all.

Mr. Young: That is all.

Mr. Hawkins: The plaintiffs rest.

Mr. Young: The plaintiffs having rested, comes now the defendant Casey and Wife and move the Court for an order directing the jury to retire and bring in to Court a verdict for the defendants, or in the alternative for an order of Judgment of Non-suit. This motion is predicated upon the fact that the evidence of the plaintiffs has failed to establish a contract of employment. They have failed to establish *the* relationship of attorney and client has ever existed between the plaintiffs and the defendants. It would seem that if any such contract [96] existed it was terminated prior to the rendering of the service claimed to have been rendered by the plaintiffs; that the services claimed by the plaintiffs to have been rendered were contained in a contract prepared by them and it appears from the testimony in this case that they were paid for such services in accordance with the terms of that contract.

The Court: I am satisfied that there is sufficient

(Testimony of Edward J. Lehan.)

evidence to put the case to the jury; that there is evidence that services were performed by the plaintiffs for the defendant in connection with the matters here testified to. The motion will be overruled.

Mr. Young: I am handing my requested instructions on behalf of the defendants, and here is a copy of the brief in support of the instructions.

Mr. Hawkins: The plaintiffs file and present their requested instructions.

The Court: We will recess until morning, we will meet tomorrow morning at 10 o'clock.

November 24, 10 A.M.

(Opening statement by Mr. Young.)

H. J. ADAMS

called as a witness on behalf of the defendants after being first duly sworn, testifies as follows: [97]

Direct Examination

By Mr. Young:

Q. State your name?

A. H. J. Adams.

Q. Where do you live?

A. Spokane, Washington.

Q. Your business or occupation?

A. Employee of the Soil Sulphate Distributing Company.

Q. Are you the Adams mentioned in this case?

A. Yes, sir.

(Testimony of H. J. Adams.)

Q. Were you the promoter of the Sulphur Springs Gypsum Company? A. Yes, sir.

Q. Tell us about that promotion?

Mr. Hawkins: Objected to as it is not within the pleadings.

The Court: No, I don't think it is. Sustained.

Q. Do you recall being in the office of Cullen and Etter during the time that the contract was negotiated between you and certain stockholders of the Sulphur Springs Gypsum Company?

A. Yes, sir, I first met them about March 18, 1948.

Q. Where did you meet them?

A. In Mr. Etter's office—Cullen and Etter.

Q. What was said and done? [98]

A. Mr. Etter was talking,—Mr. Cullen was busy in another room with another client a good portion of that time. Mr. Etter said that they had had several meetings in connection with the Sulphur Springs Gypsum Company, which I knew nothing about; that they also had an investigator, and that he proposed for the Company that I surrender two hundred thousand shares of stock to the Directors of the corporation who would act as Trustees to use that in a voting trust for a period of two years. This I refused and I made a counter proposition; that I didn't think the directors capable to operate the Company and that I would not turn my stock over under such condition.

Q. Were you president of the corporation?

(Testimony of H. J. Adams.)

A. Vice President; I bought out the stock of the President which automatically put me in to act as president.

Q. Then this Board was a new Board?

A. That I nominated and elected.

Q. Was Mr. Casey present at that meeting?

A. Yes, sir.

Q. Was he a member of the new Board?

A. Yes, sir.

Q. Go ahead.

A. I proposed that I turn over fifty thousand shares of stock as part of earnest money, consideration; first I thought I could do all this in sixty days and then [99] I asked for six months, and if I failed to secure the money if the other men in the deal wished to get out with their money plus six per cent,—if I failed they could keep the fifty thousand shares.

Q. Who were the others you referred to?

A. Mr. Busch had sixty thousand and Mr. Davis had fifteen thousand and the other directors or anybody that had any money in the Company, including Mr. Casey.

Q. Go ahead.

A. I proposed in case I failed that I would put up two hundred thousand shares to be used for a voting trust for a period of two years; that would give the directors a chance to work it out. I didn't think, however, that they were capable to do it and didn't have any inclination to do it.

Q. What was said about Attorneys' fees?

(Testimony of H. J. Adams.)

Mr. Hawkins: As between who?

Q. As between you and the firm of attorneys and the people who were there for the purpose of contracting,—the firm of Cullen and Etter.

Mr. Hawkins: Objected to as not within the issues here. As to whether Cullen and Etter had a contract with Casey, that is fixed by the pleadings.

The Court: I think that is correct, but your objection should have come earlier; at the time of the cross-examination of the witnesses for the plaintiff. I still think this should be narrowed down to the contract [100] between Casey and these plaintiffs. I will let him go ahead. You may proceed, Mr. Young.

Q. Go ahead, Mr. Adams.

A. The first thing that was done,—they started to draft a contract; it was not to be ready until the following day. I called my attorney, Mr. Huntington, at Billings, Montana. I wanted him to check over the contract and to help Mr. Etter redraft this contract. While we were talking it over, Casey, Busch, Davis, Mr. Etter and Mr. Cullen and Mr. Keinholz were present, I told them that I had a tough experience in California in which I had sent in \$15,000 in connection with a certain settlement and the attorneys had used eight thousand of it and I wanted to know what the attorneys' fees were going to be, for the reason that I was agreeing that I would return all their money plus six per cent interest and if the attorneys' fees were

(Testimony of H. J. Adams.)

to be paid I was going to have to pay them and I wanted to know what they were. Mr. Etter and Mr. Cullen went in another room and Mr. Etter again reiterated the amount of work concerned and so forth, the conferences and contracts and such and he said Mr. Adams thinks he can get this deal through in sixty days and he says if he does we should have two thousand dollars and if it goes six months we should have four thousand. However, the contract as it was [101] drawn didn't specify two thousand dollars but said "not less than Four thousand dollars." The contract didn't mention sixty days because I guess they thought it would not go through in sixty days.

Q. You have been handed an exhibit marked exhibit 15 for identification, what is that?

A. This is the contract in which I delivered fifty thousand shares of stock which was to be——

Mr. Hawkins: ——That is a contract,—he has answered.

A. Yes, it is a contract.

Q. Does it bear your signature?

A. Yes, sir.

Q. Is that the contract you were referring to in your testimony, that was finally arrived at?

A. Yes, sir.

Mr. Young: I offer this in evidence.

Mr. Hawkins: To which I object. It is the same one that was objected to by counsel yesterday and is identical to our exhibit 5.

Mr. Young: It bears the signatures.

(Testimony of H. J. Adams.)

Mr. Hawkins: As does the one that was objected to.

The Court: It may be admitted. Of course, the same question comes up now. The same contract [102] was objected to yesterday and I only allowed it in for a limited purpose. Now counsel for the defendants offers it and I am going to admit it. I don't know what may develop here.

Q. Following that,—strike that, please,—after the contract was drafted,—were you present when the final draft was made of exhibit 15?

A. Yes, sir.

Q. Did you sign it as soon as it was completed?

A. Yes, sir.

Q. Where did you sign it?

A. In the office of Cullen and Etter.

Q. Were you given a copy of the contract?

A. Yes, sir.

Q. Then what did you do?

A. I was supposed to meet Mr. Casey—

Q. You met Mr. Casey, did you?

A. Yes, sir, when he returned from Thermopolis, I met him, I was to get his signature to the contract.

Q. Did you get his signature?

A. He refused to sign.

Mr. Hawkins: Objected to as immaterial.

The Court: I think it is immaterial, but I will let it stay.

Q. Following Mr. Casey's refusal to sign the contract [103] what did you do next?

(Testimony of H. J. Adams.)

A. I met with the parties who were furnishing the money in Thermopolis, Mr. Charles Vandenhook——

The Court: ——Now this is too far afield. You will have to confine your evidence to this contract.

Q. Was there some dealings with Mr. Casey? If so, how was that handled?

Mr. Hawkins: I shall object to “some dealings.”

The Court: I think Counsel knows what my thought is. I think counsel would agree with the Court that this is a question between Mr. Casey and Cullen and Etter. If we are to go into all the conversations between Mr. Adams and Mr. Casey and all these other people, we will be here a long time. At least this should be in the presence of Cullen and Etter.

Mr. Young: I want to lead directly to the exhibit.

The Court: Go ahead and do that.

Q. Are you acquainted with the execution of exhibit 6? A. Yes, sir.

Q. Where was that executed?

A. In Mr. Nixon's office in Bonners Ferry.

Q. Mr. Nixon the attorney? A. Yes, sir.

Q. Was a copy of that delivered to you?

A. Yes, sir. [104]

Q. What did Mr. Cullen and Mr. Etter have to do with the performance of the terms of the contract exhibit 15, if anything?

A. They were to secure the stock and assign-

(Testimony of H. J. Adams.)

ments of any outstanding interest of the Sulphur Springs Gypsum Company, together with the books of the Company, the check book and minute book and have a meeting of the Board of Directors to have them resign so that everything could be turned over to the new corporation, the Wyoming Sulphate Company.

Q. The new company took over the holdings of the Sulphur Springs Gypsum Company?

A. Yes, sir.

Q. Where and how was that accomplished?

A. In the office of Huntington in Billings, Montana. Mr. Etter took the papers to Billings, Montana; met there with Mr. George C. Sinton, and Mr. Casey was there, and Charles Vandenhook was there.

Q. Mr. Etter was in Billings?

A. I meant Mr. Cullen.

Q. At that time what was done. I assume the money was transferred in exchange for the securities?

Mr. Hawkins: Ask him what was done?

Q. What was done?

A. The deal was completed as had been planned.

Q. Were all the terms of exhibit 15 performed?

Mr. Hawkins: Objected to as that is not an issue here.

The Court: That would be for the jury to decide. He can testify as to what was done but I think that is immaterial.

(Testimony of H. J. Adams.)

Q. What was done?

A. There was some little change made. Mr. Vandenhook was a hard-boiled banker.

Mr. Hawkins: Move to strike that last portion.

The Court: It may be stricken.

Q. What was done?

A. The deal was completed, the papers turned over and Mr. Cullen returned the same day he arrived in Billings.

Mr. Young: You may inquire.

Cross-Examination

By Mr. Hawkins:

Q. You said you had some tough experience in California, what was that?

The Court: I think that would be immaterial.

Mr. Hawkins: It would go to the credibility of the witness.

The Court: I don't want to place any man on defense of any other matters. We might have to try out everything in connection with other deals he may have had. I have suggested that we have gone far [106] afield in this trial.

Mr. Hawkins: We will drop the matter.

Q. This Company you are employed by, is that the successor to the Sulphur Springs Gypsum Company? A. Yes, sir.

Q. Isn't it a fact that you were first in the office of Cullen and Etter on March 6, instead of the 13th? A. No, sir.

(Testimony of H. J. Adams.)

Q. You were not there at that time?

A. No, sir.

Q. On March 13th was the first time you met Cullen and Etter?

A. It didn't take more than four days.

Q. Is March 13 the first time you met Mr. Cullen and Mr. Etter?

A. Either the 13th or the 14th.

Q. How many times were you there in the office of Cullen and Etter? A. It didn't take——

Q. Tell me this, Mr. Adams, when was the contract completed? A. On March 23.

Q. You were there every day from the 13th to the 23rd? A. Yes, sir.

Q. Then it did take more than four days if it was from the 13th to the 23rd?

A. Not over a week, from the beginning, there was Saturday and Sunday in there.

Q. Referring to exhibit 6 you didn't sign that exhibit? [107] A. No, I did not.

Q. That was signed about when, on the date it bears? A. No, sir.

Q. When was it signed?

A. About April 5th or 6th.

Q. About the 5th or 6th of April?

A. Along in there?

Q. Why was it dated back to the 23rd of March?

A. For the reason that I had agreed to pay interest from the date of the original contract which was March 23rd.

(Testimony of H. J. Adams.)

Q. To make it a part of the same deal?

A. At the same time at any rate.

Q. From the 13th to the 23rd of March, when you were there, was Mr. Davis, Keinholtz, Casey and Busch, were they there?

A. Not always but they were there on three out of four times.

Q. Mr. Cullen and Mr. Etter represented them?

A. I don't know anything about any arrangement except the Sulphur Gypsum Company.

Q. You had your attorney, Mr. Huntington?

A. Yes, sir.

Q. And these men here represented those other men?

A. I had Del Carey Smith look over this.

Q. The other attorney that met with you was Huntington, and there was Mr. Cullen and Etter?

A. That's right.

Q. Mr. Cullen continued on through the whole thing until [108] the closing of the transaction?

A. Yes.

Q. At Billings?

A. They were both very active.

Q. When was that closed?

A. May 6th, 1948.

Q. You first met them on the 13th of March?

A. Yes, sir.

Q. And this continued to May 6th?

You testified that these other men had meetings for some time with Cullen and Etter?

(Testimony of H. J. Adams.)

A. Yes.

Q. You heard the testimony here yesterday that this started in February and continued until the 6th of May?

A. Yes, I heard that.

Q. Did these men get back all the money they had invested, plus interest?

A. Yes, they got more than they invested.

Q. They got it by virtue of the contract?

Mr. Young: Objected to as immaterial.

The Court: It would be a conclusion on his part. You don't want this man to decide the case, I think the jury can do that.

Q. What was paid by you or through you by virtue of this agreement?

A. \$175,000.00.

Q. What was turned to Cullen and Etter? [109]

A. \$88,400.00.

Q. What was the amount of the claims including the interest?

A. I cannot say.

Q. Were the claims set up in the contract based on computations of what they had coming?

A. Yes, sir.

Q. Were you in the office,—you heard Mr. Etter state that he pointed out to the people there that they would have to proceed as individuals and he said, “you will have to proceed as individuals, do you want us to go ahead”?

Mr. Young: Objected to as improper cross-examination?

The Court: I think he said that he was not at that meeting.

(Testimony of H. J. Adams.)

A. No, I was not there.

Q. \$88,420.00 could that be the amount turned to Cullen and Etter? A. Yes.

Q. The difference between that and the \$175,000.00 going to Casey?

A. No, there were other stockholders not represented.

Q. How much was given to Casey?

A. The money was turned over to the Bank at Worland to clean up the indebtedness on the equipment.

Mr. Young: Was any money turned over to Cullen,—rather to Casey at Billings in your presence?

A. Mr. Cullen told me there was a \$16,000.00 check turned over to him.

Q. You didn't see that happen?

A. There were two or three offices we were in.

Mr. Young: That is all.

Mr. Hawkins: That's all.

CHARLES H. BICKERSTAFF

called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you live? A. Spokane.

Q. How long have you lived there?

A. Four years?

(Testimony of Charles H. Bickerstaff.)

Q. What is your business?

A. Feed business.

Q. Does your name appear on exhibit 15? Are you a former stockholder of the Sulphur Springs Gypsum Company?

A. Yes, it does.

Q. Were you on the Board of Directors of the Sulphur Springs Gypsum Company?

A. Not at the time of this contract.

Q. Were you in the office of Cullen and Etter during the negotiations leading up to the adjustment with Mr. Adams?

A. No, sir, I was not. I was there later but not when the [111] first contract was drawn?

Q. Were you in the office at any time when there was a discussion?

A. Yes, sir.

Q. When were you there?

A. I cannot tell the date but we were all there?

Q. Who was present?

A. Usually Frank Davis, Bill Simanton, Keinholz, and Frank Busch, I can't remember exactly but they usually were there?

Q. Did you agree to get other stockholders to turn over stock to Cullen and Etter?

A. Yes, I agreed to try.

Q. What was said with Cullen and Etter with respect to their employment?

Mr. Hawkins: When and where?

A. I cannot give the exact words.

Mr. Young: It is a question of whether or not there was a contract?

(Testimony of Charles H. Bickerstaff.)

The Court: He may answer. The question is the employment by these defendants of Cullen and Etter.

A. I don't remember how many times Casey was there. I don't remember the exact discussion with Cullen and Etter. Those things were never dreamed by me to be brought up again. He was there a time or two. [112]

Q. Do you know why he was there?

A. In the interest of the Company.

Q. Was Casey a member of the Board of Directors to your knowledge? A. Yes, sir.

Q. Did you have any discussion with Mr. Etter or Mr. Cullen with respect to their fees?

Mr. Hawkins: Between whom?

Mr. Young: Between them and himself.

A. The only time was when we went up for settlement.

Q. What was said by Cullen or Etter or either of them with respect to their fees in this case?

Mr. Hawkins: Objected to as this is not an issue in this case, a question of their fees as between Cullen and Etter and Mr. Bickerstaff is not an issue here.

The Court: Sustained.

Mr. Young: You may inquire.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Bickerstaff, you have been in the same

(Testimony of Charles H. Bickerstaff.)

office with Mr. Casey or officed in the same building with him?

A. They had their office in our building.

Mr. Hawkins: That is all.

Mr. Young: That's all, thank you.

C. W. KING

called as a witness on behalf of the defendants after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you live, Mr. King?

A. Bonners Ferry, Idaho.

Q. How long have you lived there?

A. Thirty-five years.

Q. What is your business? A. Retired.

Q. What was your business?

A. Newspaper publisher.

Q. Did you have any other business?

A. I had an interest in farming land?

Q. Were you ever associated with Mr. Casey in any business connected with the Sulphur Springs Gypsum Company? A. I was.

The Court: It seems to me we are going far afield again.

Q. What was your connection with the Sulphur Spring Gypsum Company?

A. Mr. Casey and I were co-partners forming

(Testimony of C. W. King.)

the Wyoming Mineral Products Company which had the sales contract for the Product of the Sulphur Springs Gypsum Company.

Q. I hand you exhibit marked 16 for identification and I will ask you what it is? [114]

A. That is a contract between the Sulphur Springs Gypsum Company and the Wyoming Mineral Products Company whereby we handled their product.

Mr. Young: I am offering it in evidence. I am going to show the value of that and am going to show that Mr. Casey didn't receive anything of value in this transaction that the plaintiffs are attempting to show.

Mr. Hawkins: Objected to as being immaterial here.

The Court: I don't see the materiality of it at this time, however, it may be admitted.

Q. Now, Mr. King, you are handed exhibit 6 which is admitted in this case, do you know by whom that exhibit was prepared?

A. By myself.

Q. After it was prepared what was done with it?

A. Just how do you mean?

Q. Did you go over it with anyone, and if so, whom?

A. Mr. Nixon.

Q. Following Mr. Nixon's examination was it delivered to anyone and if so, whom?

A. I think it was turned over to Mr. H. J. Adams on the same day.

(Testimony of C. W. King.)

Q. What was the net worth of the Wyoming Mineral Products Company—— [115]

Mr. Hawkins: I object——

Mr. Young: I had not finished the question.*

Mr. Hawkins: Pardon me.

Q. ——what was the net worth of the Wyoming Mineral Products Company at the time of its transfer to the purchasers of it in accordance with the terms of exhibit 15?

Mr. Hawkins: Objected to as entirely irrelevant.

The Court: I am going to admit it. I think that is the only way we will get a little speed here is to permit everything to go in.

A. I could give you my opinion, when I disposed of my interest——

Q. When was that,—strike that,—Did Mr. Casey buy your interest? A. Yes sir.

Q. What did he pay you? A. \$26,000.00.

Q. For a half interest? A. Yes sir.

Q. When did that transaction take place?

A. About one year prior to this date here.

Q. What, in your opinion, was the value of the Company at the time of this transaction?

The Court: If he knows.

Q. Yes, if you know?

Mr. Hawkins: He said he sold his interest a year before. [116]

Q. At the time you prepared your option what was the net worth?

A. A fair figure would be \$60,000.00 at least.

(Testimony of C. W. King.)

Q. I have had handed to you exhibit 17 marked for identification what is that Mr. King?

A. A chattel mortgage given by Anderson Brothers to the Farmers State Bank.

Q. Was that mortgage a part of the property of the Wyoming Mineral Products Company?

Mr. Hawkins: I object to this, he has just testified that it was a chattel mortgage given by Anderson Brothers to the Farmers State Bank.

The Court: He has identified it, I think no doubt the instrument is the best evidence.

Q. Was that chattel mortgage referred to in exhibit 6 as one of the properties Mr. Casey was going to transfer? A. Yes sir.

Mr. Hawkins: We object to this as it is not between the parties to this action.

The Court: I will admit it in view of the fact that I admitted the other.

Q. Did you discuss with Mr. Casey whether he should or should not,—or did you give him advice as to whether he should enter into exhibit 15 the option agreement running from Mr. Adams to the other named persons? [117]

Mr. Hawkins: I object to that, certainly that advice would not be a matter which would be material here.

The Court: I think perhaps you are right but I will let him answer. A. I did.

Q. What discussion did you have or what advice did you give him? A. I advised him not to.

(Testimony of C. W. King.)

Q. In lieu of that advice was exhibit 6 prepared by you? A. If it is the option, it was.

Q. Did Cullen and Etter have anything to do with the preparation of exhibit 6, or did they assist in any way? A. No sir.

Mr. Young. You may examine.

Cross Examination

By Mr. Hawkins:

Q. Cullen and Etter didn't sign it either did they? A. No sir.

Q. About a year prior to exhibit 6 you sold out your undivided one-half interest?

A. It would be in September 1946.

Q. About one and a half years. A. Yes sir.

Q. You sold your half interest in the Wyoming Mineral Products [118] Company and for that you received \$26,000.00. A. Approximately.

Q. Was Mr. Casey the sole owner of it?

A. He was so far as I know.

Q. At the time this agreement was entered into your estimate of the value of that Company was sixty thousand dollars? A. Yes sir.

Q. You have no interest in this and you were never in Cullen and Etter's office? A. No sir.

Q. Never present at any of the conversations?

A. No sir.

Q. Have you ever met Cullen or Etter?

A. No sir.

Mr. Hawkins: That is all.

Mr. Young. That is all.

ROBERT KING

Called as a witness on behalf of the defendants,
after being first duly sworn testifies as follows:

Direct Examination

By Mr. Young:

Q. Where do you live?

A. Bonners Ferry.

Q. How long have you lived there? [119]

A. Thirty-four years.

Q. Were you connected with the Wyoming
Mineral Products Company? A. Yes sir.

Q. In what capacity? A. As a salesman.

Q. How long were you connected with it?

A. About a year.

Q. When did that employment commence and
when did it cease?

A. December 1, until about a week ago. Decem-
ber 1, 1947.

Q. Are you familiar with the amount of business
done by that Company? A. Yes sir.

Q. Was that business solely confined to the sell-
ing of the products of the Sulphur Springs Gyp-
sum Company? A. Yes sir.

Q. How much of that product was sold during
that period of time?

Mr. Hawkins. Certainly this is not material.

The Court: If it is we will certainly have to
have a lot of witnesses here. I want the jury to
have everything but I fail to see the materiality
of this.

(Testimony of Robert King.)

Q. Can you quickly give us some extent of the sales?

A. During the time I was employed I would say approximately two hundred fifty carloads.

Q. How much is a carload?

A. About fifty tons. [120]

Q. How much a ton?

A. Seventeen dollars F O B at the mine in Thermopolis, Wyoming.

Q. What, in your opinion, was the value of the Company assuming it was to be sold out, lock stock and barrel. What was the value of the Company, in your opinion?

A. Approximately \$225,000.00. I am speaking of the whole thing, the Wyoming Products Company and the Sulphur Springs Gypsum Companies.

Q. I am talking about the Wyoming Mineral Products Company.

A. I would say that was worth a hundred thousand dollars.

Mr. Young: That is all, you may examine.

Cross Examination

By Mr. Hawkins:

Q. If it was worth a hundred thousand dollars and they bought out Mr. Casey for a hundred seventy thousand—

Mr. Young: —I object to that as being argumentative before the question is finished.

Mr. Hawkins: I think there are no further questions.

W. L. CASEY

Called as a witness on behalf of the defendants,
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Young:

Q. Your name is W. L. Casey?

A. Yes sir. [121]

Q. You are one of the defendants here?

A. Yes sir.

Q. Where do you live?

A. Bonners Ferry, Idaho.

Q. How long have you lived there?

A. About thirty years.

Q. What is your general business background?

A. Grain and feed elevator business and farming.

Q. Tell us how you came to be associated with the Sulphur Springs Gypsum Company?

A. I became interested with Charley King as a partner in taking the distribution for the United States for handling the product of the Sulphur Springs Gypsum Company.

Q. Was that as a result of the contract that has been introduced here in evidence, leading to the organization of the Wyoming Products Company?

A. That's right.

Q. When did you become a member of the Board of Directors of the Sulphur Springs Gypsum Company, or did you become a member of the Board of Directors of that company?

A. Yes sir.

Q. What brought that about?

(Testimony of W. L. Casey.)

A. At the annual meeting at Thermopolis.

Q. Did you own any stock in the Sulphur Springs Gypsum Company at that time? [122]

A. I did not.

Q. How did you get your stock?

A. Mr. Adams gave me twenty-five hundred shares so I could be on the Board of Directors, that was to bring the Board of Directors to Spokane, Washington, where they could be together. For that reason I went on the Board.

Q. When did you first start dealing with Cullen and Etter,—how was that brought about?

A. Sometime I think about the first of March,—the first part of March or the latter part of February when our Company was trying to get things reorganized, we had our offices, that is, the Wyoming Mineral Products Company and the Sulphur Springs Gypsum Company had offices together, one bookkeeper did the bookkeeping for both concerns.

Q. When did you first hear about the firm of attorneys of Cullen and Etter?

A. We had quite a few meetings at Spokane of the Board of Directors of the Company and what came out of these meetings,—we wished to get the Company in as good a shape as we could. Mr. Simanton recommended that he knew Mr. Cullen and he said he would have him come to a meeting at the Spokane Hotel, he notified him of the meeting and that is the first time I met Mr. Cullen.

Q. Did you go to the office of Cullen and Etter?

(Testimony of W. L. Casey.)

A. Yes sir. [123]

Q. What transpired there?

A. We had occasion to go to their office for the purpose of what we hired them for, to try to bring about a more substantial working of the Sulphur Springs Gypsum Company.

Q. Did you arrange to have Mr. Adams come there? A. Yes sir.

Q. How were you trying to reorganize the Sulphur Springs Gypsum Company at that time?

A. We were attempting to get it back on a more substantial basis than it was by getting more money in it.

Q. You heard Mr. Cullen and Mr. Etter testify that the Sulphur Springs Gypsum Company hired them to go over an audit report, what is your knowledge of that?

A. We went up and retained them to go over this report and give us advice on how to proceed.

Q. Was that employment as a member of the Board of Directors limited to looking over the C P A audit and rendering some opinion in connection with the C P A report?

A. That is my opinion.

Q. Was that employment limited to this C P A report? A. No sir.

Q. There was a general retainer?

A. That's right.

Q. Were you representing your individual capacity or were you there representing the Sulphur

(Testimony of W. L. Casey.)

Springs Gypsum Company [124] as a director, in their office?

A. I was representing the Sulphur Springs Gypsum Company.

Q. At all times? A. At all times.

Q. When did exhibit 15,—when did you first see that? A. That is the contract?

Q. That is the contract that Adams had.

A. That came out of a meeting or the meetings we had up there.

Q. When did you first see it after it was prepared? A. I think it was along about May.

Q. Were you ever requested to sign it?

A. Yes sir.

Q. Who requested you to sign it?

A. I believe it was Mr. Cullen.

Q. What did you tell Mr. Cullen as to whether you would or would not employ him under that contract?

A. My thought was that it was for the Sulphur Springs Gypsum Company all the way through.

Mr. Hawkins: Let's get the facts, not what his thought was.

Q. Mr. Casey, you are not permitted to testify to your thoughts. Did you tell Mr. Cullen and Mr. Etter that you were not employing them individually?

Mr. Hawkins: Objected to as leading. What he did talk about would be all right. [125]

The Court: Go ahead, he may answer.

(Testimony of W. L. Casey.)

A. I never told them I was employing them as an individual.

Q. When was the first time you became aware of the claim that Cullen and Etter were making of having rendered service to you individually for which they intended to charge you individually?

A. When I got notice of this suit.

Q. You had no information about any claim except this lawsuit? A. That is right.

Q. You heard Mr. Etter testify that you were urging him to go to Billings to represent you in the matter of the completion of this transaction. What is your recollection of that?

A. I don't recall that I asked him. The other members, Mr. Keinholz, Mr. Davis, Mr. Busch, Mr. Bickerstaff and Mr. Simanton, especially Mr. Busch thought he should go over as he couldn't go, he was the President of the Sulphur Springs Gypsum Company and he thought he should have an attorney over when the money was paid over.

The Court: We will take a ten minute recess.

November 24, 1948, 11:15 A. M.

Q. I will ask you this question directly, did you ever at any time urge Mr. Etter to do anything in connection with this transaction that is in controversy here? A. For the Company.

Q. For you individually?

A. No sir, I didn't.

Q. After you had given Mr. Adams exhibit numbered 6, which is an option, when did you go to Montana with relation to that time?

(Testimony of W. L. Casey.)

A. I went over about a week before the money was paid over in Billings.

Q. What did you do when you got to Billings?

A. I first got hold of Anderson Brothers who had a contract for mining the gypsum and then got hold of Mr. Sinton who was putting up the money to get our deal put over. The Company said they wouldn't make the deal until they got my contract of distribution, and warehouses and machinery and equipment at Thermopolis that the Company owned.

Q. Did you arrive at a figure as to what you would take for your interest including the sales contract?

A. Yes sir, I did.

Q. What in addition to the sales or distribution contract did you agree to yield up?

A. Mortgage on the equipment that I had from Anderson Brothers at the time it was about \$23,000.00 that I had a mortgage for.

Q. With respect to the mortgage what was the value of the equipment that you had a mortgage on?

A. That equipment was sold to Mr. George Sinton for seventy-one thousand dollars.

Q. That mortgage is in evidence now?

A. Yes sir.

Q. There was a balance of \$23,000.00 on it?

A. \$23,698 balance on the mortgage.

Q. The sales contract or the distribution contract, what was the value of that, in your opinion?

A. The value of that at that time I would say was \$65,000.00 or \$70,000.00.

(Testimony of W. L. Casey.)

Q. Did you have some stock of the Sulphur Springs Gypsum Company?

A. Yes sir, I also had a \$15,000.00 note on which there had been about a thousand paid, leaving a balance of \$14,000.00 for which I had to put up as security 23,500 shares of Sulphur Springs Gypsum stock.

Q. Were you required as a part of the transaction to yield up that note and stock?

A. Yes sir.

Q. What else did you yield up as a part of the consideration for what you were to be paid?

A. For a number of years I had dealers' advertising contract,—sales book contracts for the dealers that I turned over to them.

Q. Were these properties required to be delivered from you to the new buyer? [128]

A. That's right, they were.

Q. If you had not delivered these properties to the new buyer state whether or not the transaction could have been completed?

A. For myself,—with the distribution contracts, my interest with Mr. Anderson's contract down there, no,—if that had not been delivered the deal would not have gone through.

Q. The deal would not have been consummated?

A. No sir, it would have been impossible.

Q. What did you receive for those properties?

A. I received \$23,698.00 from Anderson Brothers that I had a mortgage for. I received \$16,618.00

(Testimony of W. L. Casey.)

at the time of the settlement in Billings, cash of \$40,316.00 in addition to a \$10,000.00 note and a two thousand dollar note from Adams. If I hadn't taken those notes according to the deal I had given him it wouldn't have gone through, I had to accept twelve thousand dollars in notes or that would have queered the deal.

Q. Have any of those notes been paid?

A. No sir.

Q. The Two thousand dollar note, is it past due?

A. It is.

Q. It has not been paid? A. No sir.

Q. Have you any security for it? [129]

A. No, sir.

Q. What about the ten thousand dollar note?

A. It is not paid.

Q. You have no security for it? A. No.

Q. Had you contemplated or had you known that Cullen and Etter were contemplating charging you fifteen thousand dollar attorney's fees or any substantial fees would you have agreed to the transfer of that property to consummate this transaction?

Mr. Hawkins: Objected to as immaterial.

The Court: He may answer.

A. No.

Q. You heard Mr. Cullen testify to the fact,—strike that,—I will ask you whether or not you made or lost money on this transaction?

The Court: That is far afield.

Mr. Hawkins: I will object to that as immaterial.

The Court: Sustained.

(Testimony of W. L. Casey.)

Q. You heard Mr. Cullen testify that after this transaction had been completed and after he was given eighty-eight thousand dollars for his clients that you came up and met him and put your arm around his shoulders and said, "this is a good job," or "this is a great job, I owe you several thousand dollars and I am going to pay you several [130] thousand dollars." Did you make such a statement?

A. I did not.

Q. In substance or effect? A. No, sir.

Q. You heard that testimony. Now did you in substance or effect say, "I realize I owe you several thousand dollars and I am going to pay you," did you ever make a statement of that sort, in substance or effect? A. No, sir.

Q. Did you consider that you, when you were in Billings,—did you consider that you owed the firm of Cullen and Etter any money?

Mr. Hawkins: Object to that, what he considers is immaterial. A. No.

The Court: He said that he didn't consider that he owed them anything, it may stand.

Q. Do you recall the testimony of Mr. Etter that he called you on the phone and he wanted you to come in and straighten this matter up and you explained that you were hard pressed, that you had your money tied up in sacks, do you recall any such statement?

A. Mr. Cullen nor Mr. Etter never mentioned any attorney's fees that I owed them.

(Testimony of W. L. Casey.)

Q. Did you ever tell them your funds were tied up in sacks and that you couldn't get any but you would shortly? [131]

A. No, sir.

Q. That conference did not occur?

A. No, sir.

Q. You had no such conversation?

A. No, sir.

Q. Did Mr. Cullen or Mr. Etter or either of them assist you in any manner in the making of your deal with the new buyer of the Sulphur Springs Gypsum Company? A. No, sir.

Q. Did they frame documents or contracts for you to use in connection with any such deal?

A. No, sir.

Q. Did they advise or counsel with you in that connection? A. No, sir.

Q. They stated that you were in their office about thirty-one times during the course of this business, what is your recollection of the number of times you were in the office of Cullen and Etter?

A. That is hard to remember because I had so much other business other than this at home to take care of, however, Mr. Busch, the President of the Company, living at Spokane——

Mr. Hawkins: That is not responsive and we object.

Q. My question was, how many times were you in that office?

A. To my recollection not over five or six times.

Q. All together? A. That's right.

(Testimony of W. L. Casey.)

Q. You heard Mr. Etter testify that the Board of Directors were in their office sitting around and he went around to each member present and said you will have to proceed as individuals, do you want to proceed as individuals? Now, do you recall that?

A. No.

Q. And that they all agreed. Do you recall of them agreeing? A. I don't recall that.

Q. Do you believe that occurred? A. No.

Q. State whether or not it did occur?

A. Not to my knowledge.

Q. In connection with these letters after this contract exhibit 15,—what is the circumstances of these letters, how did you happen to be interested in these letters?

A. I wrote those letters at the request of Mr. Busch because he was not there.

Q. Five hundred dollars was sent to a Mr. Liner. What was the circumstances of that \$500.00 being sent?

A. That was by my personal check, or rather the check of Wyoming Mineral Products Company, not a personal check.

Q. By check of the Wyoming Mineral Products Company? A. That's right. [133]

Q. Whose money was actually sent down?

A. My money.

Q. What if anything did the Sulphur Springs Gypsum Company do by way of repaying you?

A. They gave me the money back. It was sug-

(Testimony of W. L. Casey.)

gested to Mr. Cullen and Etter that the money be sent down but that someone else send it,—that owed the note. The Sulphur Springs Gypsum Company owed that note. The purpose was to stall it along.

Q. The Sulphur Springs Gypsum Company gave you the five hundred dollars and you sent your check down? A. That's right.

Q. On whose behalf was that service performed?

A. The Sulphur Springs Gypsum Company.

Q. Was that fact made known to Mr. Cullen and Mr. Etter? A. They knew it.

Q. Do you have a regularly retained attorney to take care of your private business?

Mr. Hawkins: That is objected to, this is a matter of contract with Mr. Cullen and Mr. Etter.

The Court: I feel that we have violated about every rule of evidence during this trial. I will sustain this objection.

Mr. Young: I would like to make an offer of proof. [134]

The Court: Go ahead, let him answer the question. It is much quicker.

Q. Do you have a regular attorney for your business? A. Yes, sir.

Q. How long have you had that attorney?

A. About four years.

Q. Who is that attorney? A. Mr. Nixon.

Q. Did you consult with Mr. Nixon on how you were to handle this business in Montana?

Mr. Hawkins: Objected to again as immaterial.

The Court: He may answer.

(Testimony of W. L. Casey.)

A. Yes, I did.

Q. You recall Mr. Cullen testified that you told him that you got forty thousand dollars in cash in Billings?

A. Yes, I recall that.

Q. Did you make such a statement?

A. No sir, I couldn't have because I didn't get it.

Q. Exhibit 18 which was marked for identification has been handed to you. Will you tell us what it is?

A. This is a receipt for moneys and for everything I turned over to the new Company.

Q. Does that represent all the money you received?

A. Yes, sir. [135]

Q. Everything is stated in that receipt?

A. Yes, sir; everything is stated in here.

Q. Was that given to you as completing the deal?

A. Yes, this is the completion of the deal.

Q. Did you have that receipt at the time Mr. Cullen was over there?

A. Yes, sir; I got it at the same time he was there.

Mr. Young: I offer this in evidence.

Mr. Hawkins: No objection.

The Court: It may be admitted.

Mr. Young: You may cross examine.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Casey, your business was grain, feed and elevator business?

A. Yes, sir.

(Testimony of W. L. Casey.)

Q. You are still in that business? A. No.

Q. Recently sold that?

A. Yes, sir. Recently sold.

Q. What business are you engaged in now?

A. No business.

Q. Have farming interests.

A. Sold the farming interests.

Q. Liquidated all your business interests?

A. On account of my health.

Q. Your first introduction to the Sulphur Springs Gypsum Company [136] was when you got twenty-five hundred shares of stock so that you could get on the Board of Directors so that you could move the Board to Spokane?

A. Yes, sir.

Q. That was as a director? A. Yes, sir.

Q. Did you ever pay for that? A. No, sir.

Q. Why did you get on the Board of Directors, was there any reason?

A. To make a quorum and because of the contract I had.

Q. You are referring to the Wyoming Mineral Products Company.

A. Yes, sir, that's right, the contract I had with the Sulphur Springs Gypsum Company when we had a meeting there was not enough to have a full amount of the directors to move up here, so I went on the Board.

Q. Did some others go on the Board at that time? A. Yes, sir.

Q. Mr. Busch, Davis, Keinholz got on the board at that time?

(Testimony of W. L. Casey.)

A. That's right.

Q. Was there some difficulty about the management of the Company at that time?

A. Yes, sir.

Q. You were afraid of the management of the company? A. Yes, sir. [137]

Q. You wanted to get on the Board to straighten that up?

A. No, I wanted to get it straightened up, but I didn't figure that I should be on the Board.

Q. Did you then employ a firm of Certified Public Accountants to give you a report?

A. Yes, sir.

Q. Did you get a report? A. Yes, sir.

Q. Did you hold a meeting with respect to that?

A. Yes, sir.

Q. Was Mr. Cullen at that meeting?

A. Yes, sir.

Q. How did he happen to be there?

A. There was some discussion as to what attorney——

Q. ——Let me ask this, who invited Mr. Cullen or Mr. Etter there? A. Mr. Simanton.

Q. Did you have the report of the C P A there?

A. No, I don't think we did.

Q. Or the books of the company?

A. No, sir.

Q. Did Mr. Cullen advise you that evening or give you any opinion or advice?

A. No, I think he was there for dinner, I think there was just a discussion. [138]

(Testimony of W. L. Casey.)

Q. He was there as an attorney for the purpose of determining what the facts were?

A. I recall we had another attorney at that time.

Q. Somebody invited Mr. Cullen?

A. They must have, I didn't.

Q. That is where you first met him?

A. Yes, sir.

Q. Did you later meet him again in his office?

A. Yes, sir.

Q. Do you remember when you first called at the office of Cullen and Etter?

A. Not exactly.

Q. Isn't it a fact that it was on March 3, 1948, you and Mr. Davis called on Cullen and Etter?

A. I wouldn't remember the dates.

Q. At that time were the books of account in the office of Cullen and Etter?

A. I think they were.

Q. Did you confer concerning any findings they had made or recommendations they had to make?

A. That's right.

Q. Did you go back on the 4th of March?

A. I don't recall going back the next day.

Q. And again on the 5th you and Mr. Busch went in in the afternoon?

A. Yes, I remember that. [139]

Q. And on the 6th you were advised that because a majority of the stock was in the hands of Mr. Adams you would have to proceed on an individual rather than a corporate basis?

(Testimony of W. L. Casey.)

A. I don't remember.

Q. Was it at that time you started on this individual contract?

A. That I started on this contract, you say?

Q. Isn't that when you started to discuss drawing up a contract between those investors and Mr. Adams?

A. That's right.

Q. It ultimately culminated in the contract of March 23rd?

A. I don't remember what was the date.

Q. Exhibit 15 bears the date of March 23rd?

A. Yes, sir.

Q. During that time from the 3rd of March to the drafting of this contract you were in and out of Cullen and Etters' office on many occasions?

A. I don't remember how many. I was there, yes, in behalf of the Sulphur Springs Gypsum Company and my own individual stuff was separate.

Q. You had stock in the Sulphur Springs Gypsum Company?

A. Yes, sir, and on the Board of Directors.

Q. You had an individual investment of approximately sixty-five thousand, or rather, sixty-nine thousand, five hundred dollars? [140]

A. That is what we talked about.

Q. You gave them that information?

A. I gave them that. That was my best estimate. That is what I thought I had.

Q. You wouldn't set it out then because you wanted to make a trip down to Wyoming to get the definite figure?

(Testimony of W. L. Casey.)

A. I wouldn't go into that because Anderson Brothers were tied up with me; they were the contractors down there, I was the distributor for the product of the Company, I couldn't very well do anything until we got Anderson in the same frame of mind I was in.

Q. You went to Thermopolis to determine so that you would know what you had coming from the Sulphur Springs Gypsum Company, and the amount you would have to turn over?

A. In talking to Anderson I found out what it would take to get me out?

Q. That is why your amount was left indefinite at that time?

A. I didn't know at that time what I had.

Q. On the 6th of March do you recall sitting in there with Busch, Davis, Keinholz and Cullen and Etter, you remember the conversation with the six of you present on the afternoon on that day?

A. There possibly might have been one.

Q. Do you recall on that occasion Mr. Cullen or Mr. Etter [141] advising you that the corporation, or that you could no longer proceed as a corporation because you couldn't represent yourselves individually and as a corporation, or directors of the corporation, do you remember that?

A. I don't remember it,—I was in at different times.

Q. You were in this group, you were a director?

A. That's right, I was a director.

(Testimony of W. L. Casey.)

Q. You had money in the Sulphur Springs Gypsum Company? A. Yes, sir.

Q. Invested in the Sulphur Springs Gypsum Company?

A. No, sir, I had no money invested.

Q. You had claims? A. Yes, sir.

Q. You were a claimant, and you were also a director? A. That's right.

Q. Did Mr. Etter advise you that you could not as a director prosecute your claim for individual recovery? A. Not that I recall.

Q. He didn't so advise you? A. No, sir.

Q. Do you recall that he advised the other three men? No, sir, I don't recall.

Q. You heard the testimony of Mr. Davis and Mr. Keinholz here yesterday?

A. Yes, I did. [142]

Q. You testified here as to some values; this mortgage by Anderson for \$23,680.00 I believe it was, against some personal property.

A. It was \$36,000.00 at first.

Q. At the time of the settlement it was some \$23,000.00. A. Yes, sir.

Q. From March 6, down to the time of settlement had you received any money from the Sulphur Springs Gypsum Company for royalties or payment on this mortgage? A. Yes, there was some.

Q. How much money was paid between the 6th of March down to the 6th of May?

A. I wouldn't recall, but we had fifty cents roy-

(Testimony of W. L. Casey.)

alty coming from Anderson Brothers to apply on this mortgage.

Q. When you originally submitted the figure on the 6th of March it was \$69,500.00 and you say you collected \$52,316.42? A. Yes, sir, that's right.

Q. Did you collect as much as seventeen thousand dollars between the 6th of March and the 6th of May? A. No, sir.

Q. Well, what is your best estimate?

A. That would run in the channel of business, what we were making.

Q. It was a part of the claim against the Sulphur Springs Gypsum Company and your contract with them?

A. I couldn't say where I had any money except that I had [143] that Sulphur Springs Gypsum Company stock and that note for \$15,000.00 that we advanced.

Q. The \$69,500.00 that included not only your individual claims but also that of the Wyoming Mineral Products Company, did it not?

A. I couldn't see how the Wyoming Mineral Products Company had any claims.

Q. They were getting royalties?

A. Getting some money back through royalty from Anderson Brothers.

Q. Were you getting any individual royalties?

A. No, sir.

Q. All the royalties were going to the Wyoming Mineral Products Company?

(Testimony of W. L. Casey.)

A. Yes, sir, Anderson Brothers were paying fifty cents a ton.

Q. You did get some money between the time you first started negotiating the contracts down to the final settlement, you got some money?

A. From the time we started negotiating the contract until when?

Q. May 6?

A. Very little, we didn't do much business.

Q. You don't know how much?

A. No, sir, I don't.

Q. Did they pay you on the mortgage between March 6 and May 6?

A. There would have been some,—no, not any paid on the mortgage. [144]

Q. Reading from Exhibit 6, “a certain second mortgage issued by Anderson Brothers, contractors, of Thermopolis, Wyoming, in the sum of \$26,000.00.” Was it \$26,000.00 or \$23,000.00?

A. It was \$23,000.00.

Q. At the time of this letter of March 23, although it was drawn on April 6, and dated back, was the balance \$23,000.00 or \$26,000.00?

A. \$23,698.00.

Q. It remained at that figure until May 6?

A. Yes, sir.

Q. That was a second mortgage?

A. That mortgage was given to us after we had taken another mortgage.

Q. Who had the first mortgage?

(Testimony of W. L. Casey.)

A. That is what I am trying to explain. We had a mortgage; after we got a mortgage on the equipment then the boys borrowed.

Q. Who are the boys?

A. Anderson Brothers. They got a R F C loan.

Q. On the equipment?

A. Yes, and we took a second mortgage.

Q. Did you waive your rights in order for the R F C to get a first mortgage?

A. I don't recall that we did.

Q. Then, why do you say a second mortgage?

A. Evidently it was a second mortgage, the other had a first mortgage.

Q. The other was the R. F. C.?

A. Yes, sir.

Q. Do you know how much their mortgage was?

A. Twenty-six thousand.

Q. In the same amount as this?

A. Twenty-three thousand at that time.

Q. You said in the letter——

A. ——The R. C. or R. F. C. was thirty thousand and was paid down I don't know exactly how much but from a letter, when they made settlement they owed the R. C. about twenty-six thousand or maybe twenty-four thousand.

Q. In this letter (indicating) you mention fifty-two thousand, how was that made up?

A. That was from the mortgage on the equipment; this fifteen thousand dollar note and the amount of the advertising material, and this contract.

(Testimony of W. L. Casey.)

Q. And the good will?

A. If it was worth anything, the good will.

Q. Did you capitalize it, put a value on it?

A. I would say in a business deal when you turn over the business you turn over the good will.

Q. Were you paid for good will?

A. I don't know whether that would be good will or not. I got \$52,362.00.

Q. That is all the money you got? [146]

A. That was all——

Q. ——just a moment, Mr. Casey,—that is all the money you got for the Wyoming Mineral Products Company or in the name of Casey?

A. \$40,000.00, the \$23,000.00 and the notes; \$40,416 cash was every dime I got out of it.

Q. There was listed here (indicating exhibit) check for \$16,818. A. Yes.

Q. Did you get more as a Director or as an individual? A. As an individual.

Q. Didn't you have a check signed by the Sulphur Springs Gypsum Company and deliver it, for \$26,000.00 to the new purchasers?

A. I don't recall whether Mr. Cullen took that or I did.

Q. The books were kept for the Wyoming Mineral Products Company and the Sulphur Springs Gypsum Company in your office?

A. That's right.

Q. Checks were issued from your office?

A. That's right.

(Testimony of W. L. Casey.)

Q. You don't recall whether you took it or Cullen did? A. I didn't take it over.

Q. Were the assets surrendered to the new purchasers of the Sulphur Springs Gypsum Company on the 6th of May? A. That's right.

Q. All the cash on hand of the Sulphur Springs Gypsum Company was turned over to the new purchasers? A. Yes, sir. [147]

Q. Had Cullen and Etter submitted a bill to the Sulphur Springs Gypsum Company other than that five hundred dollar bill that was paid and submitted on the 16th of March,—submitted on the 6th and paid on the 16th? A. Not that I know of.

Q. You turned over twenty-three thousand shares of stock pledged as security for the balance of \$14,000? A. That's right.

Q. You had a twenty-three thousand dollar balance on this mortgage? A. Yes, sir.

Q. That property was sold for \$71,000.00?

A. Yes, sir.

Q. If they hadn't paid the \$23,000.00,—you didn't surrender that property, did you?

A. No, that was sold. Anderson Brothers sold their equipment and storehouse,—warehouse for \$71,000.00, out of the \$71,000.00 I got this \$23,000.00.

Q. All you had there was \$23,000.00, or \$23,700.00. A. That's right.

Q. Mr. Casey, you were aware of the fact that from March to the 6th of May Cullen and Etter were serving as Attorneys in this proceeding?

(Testimony of W. L. Casey.)

A. That's right.

Q. But you deny that they were representing you?

A. My individual stuff was on my own. [148]

Q. Do you know they were representing the other people in their individual capacity, Mr. Davis, Busch, and Keinholz. Do you know that?

A. I know they had their meetings up there and this contract was drawn and that it was understood that all the attorney's fees to be paid was in that contract.

Q. Mr. Casey, did you bring Anderson Brothers and Mr. Jensen and Mr. Busch into the office of Cullen and Etter and discuss this matter with Cullen and Etter prior to the time you got any money?

A. That's right, they were up there. I told them Mr. Adams was going to raise the money and wanted us to buy them out; that he had a contract. At that time as I recall we came up for the reason that they wanted to see if the deal would go through.

Q. Did you ever tell Cullen and Etter you were not going to pay for their services in this matter?

A. They never asked for attorney's fees.

Q. You deny that you told Mr. Cullen they had done a good job for those fellows and you were going back and tell the others what a good job they had done and that you were indebted to them several thousand dollars.

A. I knew they had done a good job. I certainly didn't tell them that I owed them several thousand

(Testimony of W. L. Casey.)

dollars and was going to come back and pay them.

Mr. Hawkins: That is all. [149]

Redirect Examination

By Mr. Young:

Q. Was the mortgage with Anderson Brothers drawing interest? A. Yes, sir.

Q. What was the rate? A. Six per cent.

Mr. Young: That is all.

Mr. Hawkins: Nothing further.

The Court: We will recess until 1:15. Counsel will meet me at 1:15.

November 24, 1948, 1:15 P.M.

The Court: Did the defendants rest.

Mr. Young: The defense rests.

Mr. Hawkins: Plaintiffs rest.

Mr. Young: The parties having rested their case and the testimony having been put in, comes now the defendant Casey and wife and moves the Court for a directed verdict in this case or in the alternative for a judgment of nonsuit or dismissal, for the reasons heretofore stated in the motion made at the conclusion of the plaintiffs' case. It appears that there is no testimony supporting any of the allegations of the complaint and there has been a total failure of proof of a contract of employment between the defendants Casey and wife and the plaintiffs; that under the law of Washington the place where the contract was made, the [150] defendants

had the right to terminate the relation at any time they chose without cause, and that the attorneys would only be able to recover for the reasonable value of the services up to the time of that termination. It appears that Casey, on behalf of the community, negotiated for and completed each and every and all business transactions in connection with the subject matter of this litigation; moreover it does not appear that there was any telephone calls and office expense in the sum of \$39.14 expended for and on behalf of the defendants Caseys, and there is a total absence of proof upon which recovery can be had in this case.

The Court: The item of \$39.14 may be eliminated and the jury will be instructed to disregard it, otherwise the motion is overruled.

The record may show that counsel met at this time with the Court in chambers to go over the instructions and were advised of the instructions the Court would give.

(Argument to the jury)

The Court: Lady and Gentlemen of the Jury: It is the duty of the Court at this stage of the trial to instruct you as to the principles of law applicable to the matter you are to determine. You have been very attentive during the entire trial and I am sure it is unnecessary to go into great detail as to the pleadings [151] on file or the issues as made up by those pleadings. As you have been advised this is an action brought by the plaintiffs R. Max Etter and

William E. Cullen, against the defendant W. L. Casey wherein they seek to recover \$15,039.14 by reason of the allegations in their complaint, they allege that they have rendered certain services for the defendants and that the defendants had agreed to pay them for the services rendered and that the amount of \$15,000.00 is a reasonable fee for such services and that they have advanced \$39.14 and they seek to recover this amount in the action now on trial here. The \$39.14 item has been stricken by the Court and you will not consider that item.

The defendants have filed an answer denying the allegations of the complaint.

I think I will permit you to take the pleadings, that is, the complaint of the plaintiffs and the answer of the defendants, to the jury room with you and you may refer to them for any assistance they may be to you in your deliberations.

In passing upon the issues in this case the burden is upon the party asserting the existence of a fact to establish that fact, thus you will see that in a case such as we are considering here the burden is [152] upon the plaintiffs to establish by a preponderance of the evidence, the cause of action as set forth in their complaint.

By a preponderance of the evidence is not meant a greater number of witnesses, but a greater weight of the evidence. That is what the word "preponderance" means; evidence which convinces you that the truth lies upon one side or the other. It is evidence which is more convincing.

You are the sole Judges of the credibility to be given to the testimony of any witness, and in determining the weight which you give to testimony you may consider the interest of the witnesses, if any, in the result of the case, the demeanor, and frankness of the witnesses while on the stand. In other words, bring to bear your common sense and experience in hearing the testimony and in passing upon the credibility of the witnesses.

You will, of course, accept the instructions of the Court as the law of the case. It is my duty to give you the law, and likewise it is your duty to accept the law as given, you will recall that is one of the questions asked you before you were sworn to act in this [153] case. It is possible, while not probable that some juror may have a preconceived notion as to what the law is or should be, and that may differ from the law as given by the Court, for that reason, the wise provision was made that it should be the duty of the Court to give the law and the duty of the jury to accept it.

I will also mention that it is your duty and your right to pass upon the facts, this, the Court has nothing to do with, and I cannot help you in any way because we have an equally wise provision that it shall be the jury's responsibility to pass upon the facts.

This case has been ably tried and the question you are to pass upon is relatively simple; the evidence in some regards has taken a rather wide range, but after all has been said the question for you to decide

is: Was there a contract between the plaintiffs and this defendant, and I do not mean by that a written contract, I mean was there an understanding,—a meeting of the minds between the plaintiffs and the defendant concerning the employment of the plaintiffs to do certain work and render certain services for the defendant. If you determine that there was such agreement, then you will come to the question; did the plaintiffs render the service; if you determine that they did; then you come to the [154] question of the amount they are entitled to receive as compensation for those services. On the other hand, if you answer the first question in the negative, that is, if you determine there was no understanding or agreement between the plaintiffs and the defendant concerning work to be done and services to be rendered, you need go no further, as your verdict will be for the defendant, and likewise if you determine that the plaintiffs did not render any service to the defendant, your verdict will be for the defendant.

In your deliberation if you determine that there is an amount due from the defendant to the plaintiffs, you will bear in mind that it is a question left to twelve men and women such as you to determine what is fair and just and what is a reasonable amount to be allowed, keeping in mind the evidence in this case as to the work done and amounts involved and such other evidence as will determine the amount that you think is fair and reasonable.

If you find from a preponderance of the evidence

in this case that the defendants did in fact employ the plaintiffs to render services for and on their behalf, such contract is terminable at the will of the defendants, and the [155] defendants would not be precluded thereby from settling or compromising any matters which may have been the subject of such employment, if any you do find to have arisen between plaintiffs and defendants.

In this connection I instruct you that if you find from a preponderance of the evidence that the defendants did in fact employ the plaintiffs and that following such employment the defendant did in fact settle the controversy which was the subject of the employment without consulting the plaintiffs, such settlement would have the effect of terminating the employment of the plaintiffs, and the plaintiffs would only be entitled to recover for the reasonable value of their services rendered up to the time of such settlement by the defendants.

I instruct you that the mere fact that the plaintiffs, in their capacity as attorneys, rendered services at the instance of the Sulphur Springs Gypsum Company, a corporation, and that those services may have been beneficial to the defendant, would not render the defendants liable to pay the plaintiffs any compensation in the absence of an agreement running from them to the plaintiffs to pay for such services. In other words, an obligation to pay for attorneys' services must rest [156] a legal duty to pay rather than moral considerations.

I think I should say to you in that regard that the

fact, if you find it to be a fact that the plaintiffs Etter and Cullen had a contract with or performed services for other individuals or corporations and received fees or compensation for such services is not a matter that concerns you in your deliberations here. You are concerned only with the question of whether there was an agreement for services between the plaintiff and defendant and whether the services were rendered and paid for, if you find services were rendered by the plaintiffs for the defendant under agreement, and not paid for by the defendant, then you will find the amount due and so state by your verdict.

Expert testimony has been submitted to you in this case, as is done in many cases, and by expert testimony of course, is meant, usually an opinion of an expert or a person skilled, trained and qualified in some line of work or profession, the opinion is given to acquaint the jury with matters under consideration from the standpoint of such trained expert. Such testimony is no doubt of great assistance, but in the final analysis you will pass on the facts, determining which party should prevail, and if you determine the plaintiffs should prevail, [157] you will fix the amount to be allowed.

You will not consider any remarks made by the Court in ruling on questions during the course of the trial. If you have gathered from any remark made by the Court in ruling on evidence or otherwise, during the trial of the case, that the Court has any opinion as to the facts, then you will dismiss

that from your minds. It has not been my intention to indicate any feeling in the matter, as I have told you heretofore, it is your responsibility, and yours alone, to pass upon all questions of fact.

It is necessary that you all agree in finding a verdict, when you retire you will elect one of your members as foreman, when you arrive at a verdict your foreman alone will sign the same and return it to open Court.

Two forms of verdict have been prepared and you will use the one which reflects your finding. One is prepared with a blank space for the amount of compensation, in case your verdict is in favor of the plaintiffs, the other has no blank space and is to be used if your verdict is in favor of the defendant.

I will ask you to retire for just a moment [158] while I take up a matter of law with the attorneys, you will then be called back for final instruction.

The Court: Do you have any objection, Gentlemen, to the instructions of the Court as given.

Mr. Young: No objection.

Mr. Hawkins: None at all.

Mr. Young: I have one thought, Your Honor, perhaps in the nature of a stock instruction in view of some remarks or inference that my client is a wealthy retired man, I think the instruction should be given that all persons are equal before the law; that they should not consider the needs of one and the ability of the other to pay but that all persons are equal before the law. I think in view of counsel's remarks in the argument that instruction should be given.

The Court: Mr. Bailiff, you may return the jury.

Now, Lady and Gentlemen of the Jury, during the course of my instructions I failed to advise you that you are only to consider testimony that have been given to you from the stand. Attorneys, in their arguments because of no fault or desire to mislead the jury but by explanation from their viewpoint sometimes get a little beyond the evidence and you should not consider any statement by counsel on either side as to the [159] evidence, if it is not as the evidence was given from the witness stand. You will only consider the evidence of the witnesses as given on the stand, and of course, giving attention to the attorneys' arguments as it applies to the evidence. It has also been called to my attention that there have been some remarks made on both sides which may have some influence here, however, I know that you will not consider them in your deliberation and in your consideration of the case. I will caution you, however, that you should not consider this case as between the plaintiffs as attorneys and the defendants as wealthy retired persons. You will consider this case as being between two parties entirely equal. If we were trying a case here where one party was a corporation and the other an individual, you would not consider that at all, you would treat them as equals; that is the way cases must be tried and decided, you will take the evidence and on that determine which side should prevail.

Are counsel satisfied?

Mr. Young: Very much.

Mr. Hawkins: Yes, Your Honor.

The Court: The Bailiffs will be sworn and the jury may retire to consider their verdict. [160]

CERTIFICATE

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official reporter for the United States District Court, District of Idaho; I further certify that I reported the evidence given and the proceedings had in and about the trial of the above entitled cause and thereafter transcribed the same.

I further certify that the foregoing transcript consisting of pages numbered to 160 exclusive of this certificate, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In witness whereof I have hereunto set my hand this 28th day of June, 1949.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed July 1, 1949.

[Endorsed]: No. 12287. United States Court of Appeals for the Ninth Circuit. W. L. Casey and Agnes Casey, Appellants, vs. R. Max Etter and William E. Cullen, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed July 7, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 12287

R. MAX ETTER and WILLIAM R. CULLEN,
Appellees,

vs.

W. L. CASEY and MRS. JANE DOE CASEY
(whose true Christian name is AGNES CASEY), his wife,

Appellants.

OF RECORD FOR PRINTING
ADOPTION OF POINTS AND DESIGNATION

Come now the appellants and in compliance with Rule 19, sub-division 6, hereby adopt as their points the statement of points filed in the District Court herein and which appear in the record forwarded

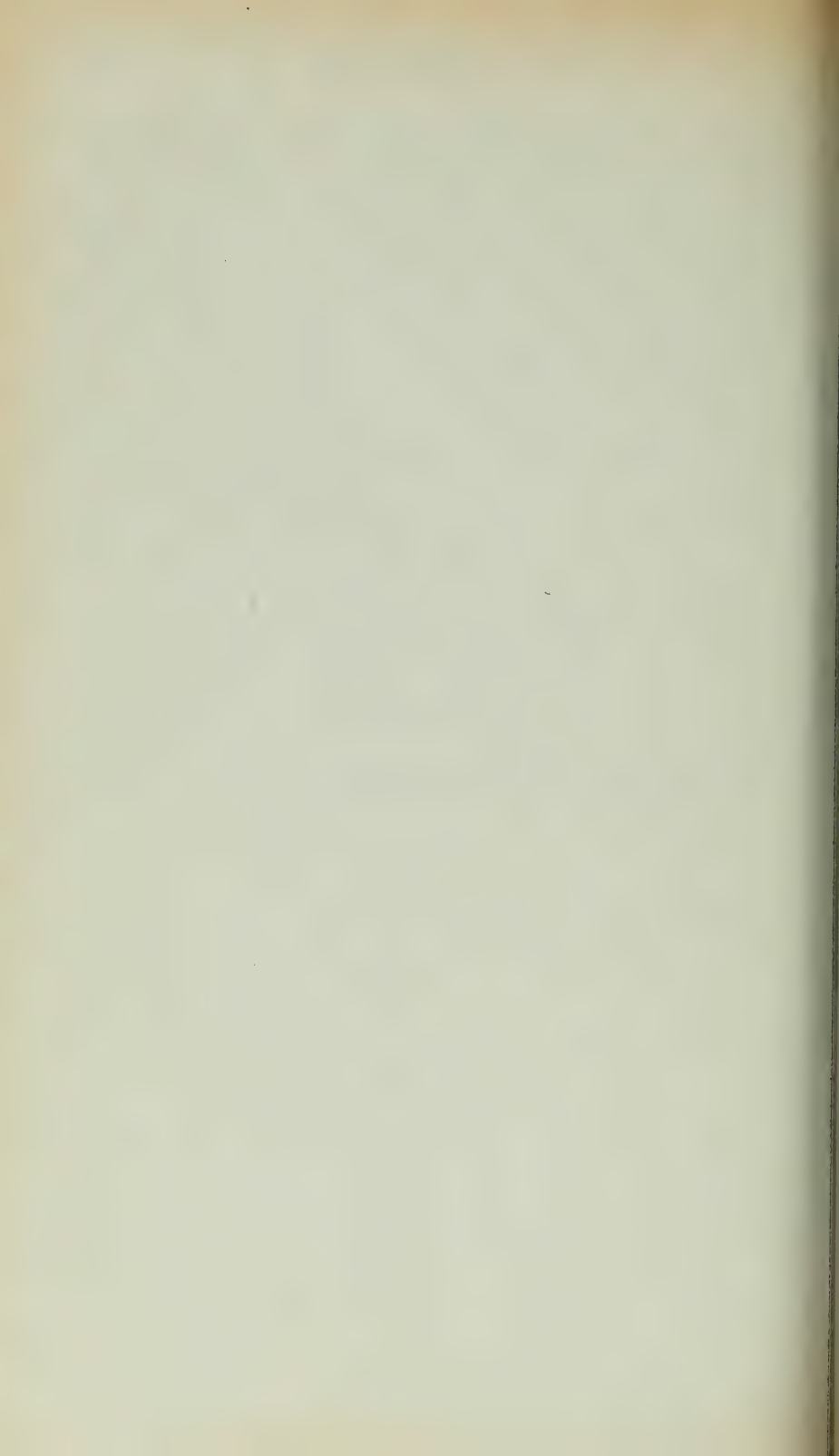
by the Clerk of the District Court to the Clerk of this Court, and appellants hereby designate such as the record to be used on appeal herein and in the printing thereof does respectfully request the Clerk of this Court in the preparing of such record to omit the title on all pleadings filed in the cause except on the complaint, and insert in lieu thereof "title of court and cause" followed by the name of the pleading or instrument, and the date of filing. You will also please omit the verifications and note in lieu thereof "duly verified" if the same be verified. You will also omit the acknowledgment of service on all pleadings and other documents.

/s/ W. J. NIXON,

/s/ GEO. W. YOUNG,

Attorneys for the Appellants.

[Endorsed]: Filed July 7, 1949.



United States
Circuit Court of Appeals
For the Ninth Circuit

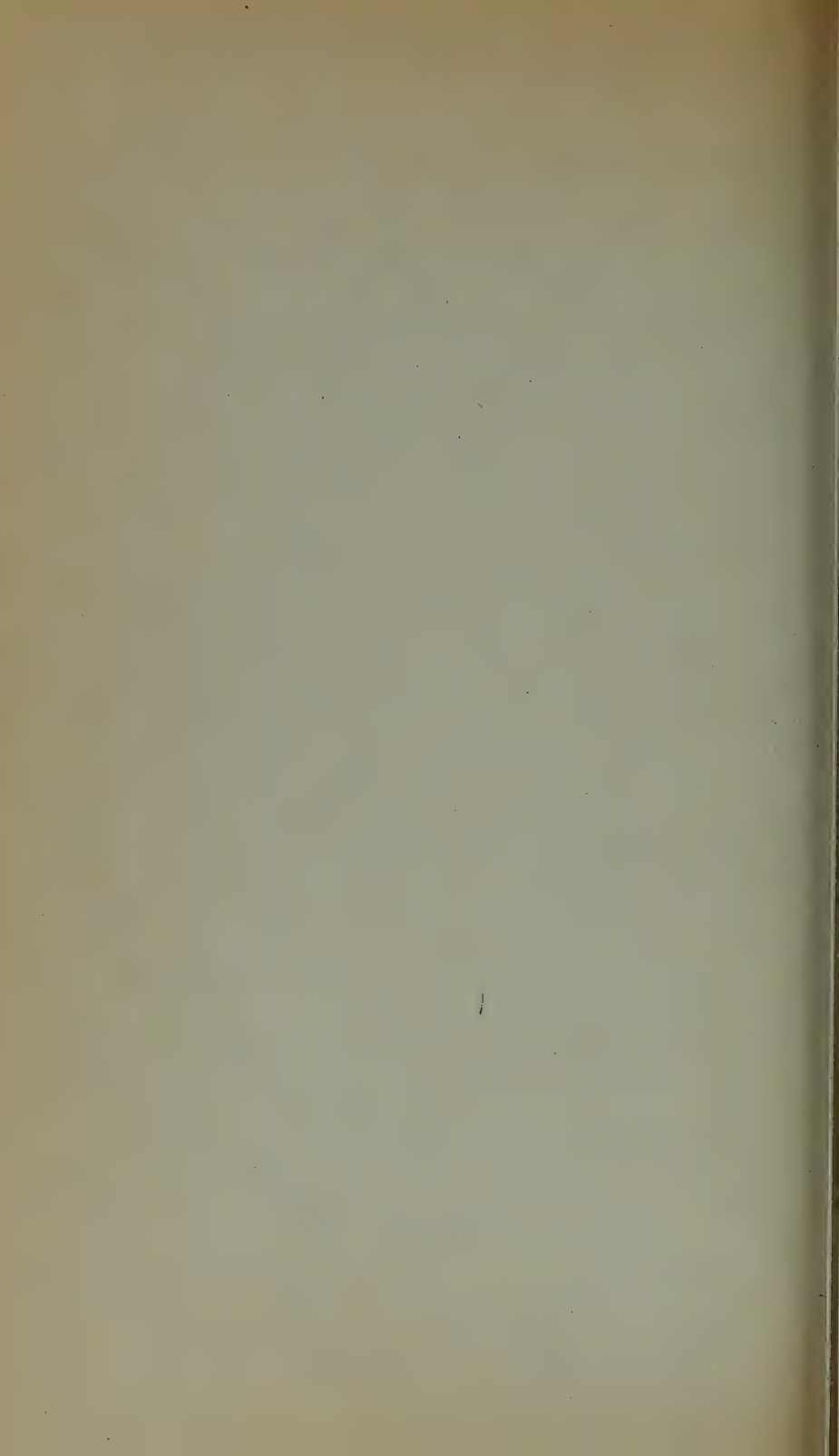
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|---|---|-----------|
| W. L. CASEY and AGNES CASEY, Appellants, | } | No. 12287 |
| vs. | | |
| R. MAX ETTER and WILLIAM E. CULLEN, | | |
| Appellees. | | |

Brief of Appellant

*On Appeal From the District Court of the United
States for the District of Idaho,
Northern Division*

HON. CHASE A. CLARK, *Judge*

W. J. NIXON,
Courthouse,
Bonners Ferry, Idaho,
GEO. W. YOUNG,
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Spokane, Washington,
Attorneys for Appellants.



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No. 12287

United States

Circuit Court of Appeals

For the Ninth Circuit

W. L. CASEY and AGNES CASEY,
Appellants,

vs.

R. MAX ETTER and WILLIAM
E. CULLEN,
Appellees.

No. 12287

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This action was commenced by appellees by the filing of a complaint in and the issuance of summons from the District Court of the United States, for the Northern District of Idaho. (Tr. 2.) Appellees were and are citizens and residents of the State of Washington. Appellants were and are citizens and residents of the State of Idaho, residing at Bonners Ferry. The amount in controversy was \$15,000.00. The statutory provision which sustains the jurisdiction of the District Court is 28 *U. S. C. A.* 1332. The statutory provision which sustains the jurisdiction of the Circuit Court is 28 *U. S. C. A.* 1291.

STATEMENT OF THE CASE

SUMMARY OF PLEADINGS

In their complaint, appellees alleged that they were attorneys at law, authorized to practice; that appellants were husband and wife, and the obligation referred to in their complaint was created in the State of Washington. They complain that on or about February 13, 1948, appellants employed them to perform legal services; that their employment was for the purpose of collecting moneys owing to appellants by others in an amount approximating \$75,000.00, and that appellants agreed to pay them a reasonable sum for such services. Appellees further alleged that in pursuance of their employment, they advised and consulted with appellants concerning their interests in respect to the collection of said moneys, and that in pursuance of said employment they negotiated, recommended, framed and supervised certain contracts, instruments and proceedings and did analyze and recommend, advise and perform services for and on behalf of appellants between February 13 and June 14, 1948, with the result that appellants received from claims in *controversy* and in settlement thereof a sum of approximately \$60,000.00; that the services rendered by appellees to appellants were and are of the reasonable value of \$15,000.00.

Appellants, by answer, denied that they were indebted to appellees in any sum or sums whatsoever and interposed as an affirmative defense that the relationship of attorney and client never existed between them.

Upon issue thus joined, the case was tried by the Honorable Chase Clark, sitting with a jury.

SUMMARY OF EVIDENCE

Appellant, W. L. Casey, who will hereinafter be referred to as if he were the sole appellant, was a member of a board of directors of the Sulphur Springs Gypsum Company, a Wyoming corporation. He also owned stock control of the Wyoming Mineral Products Company, a Washington corporation.

The Sulphur Springs Gypsum Company was the result of a promotion by one H. J. Adams. Adams sold stock and gave evidences of debt running from himself and the corporation to various persons. (Tr. 41, 87.) The purpose for which that corporation was organized was to mine a gypsum product in the State of Wyoming used primarily as fertilizer. Wyoming Mineral Products Company was organized by appellant and one King for the purpose, among other things, of exclusive distribution of the products of Sulphur Springs in the territory of the United States.

Adams owned or controlled a majority of the stock of the Sulphur Springs Gypsum Company. (Exs. 5-15, Tr. 38.) It had 51 stockholders. (Tr. 78.)

Some of the stockholders became disgruntled with Adams' administration of the business of Sulphur Springs. Sulphur Springs' board of directors employed appellees to investigate into its affairs. (Tr. 38, 147.) They were paid a retainer of \$500.00 by Sulphur Springs. (Tr. 53, 94.) Appellant, along with

other members of the board of directors, consulted with appellees. (Tr. 41.) Adams sold stock to various persons with a guarantee that if they were dissatisfied, he would repay their investment, plus 6% interest. (Tr. 81.) Some of the directors of Sulphur Springs were interested in securing from Adams a performance of his agreement with them to refund their money, and so advised appellees. Appellees advised such directors that Sulphur Springs as a corporation could not enter into a contract or proceeding to compel Adams, the promoter, to take up their stock or pay evidences of debt running from Adams to them as individuals. Consonant with this advice, certain of the board of director members and stockholders of Sulphur Springs decided to pursue their quest for reimbursement from Adams as individuals. (Tr. 43.) Negotiations were had with Adams which ripened into a contract. (Exs. 5-15.) Exhibits 5-15 were prepared by appellees. (Tr. 48.) For the convenience of this court, we epitomize the terms of that exhibit:

Adams agreed within six months from the date of that contract, to pay to all persons signing it an amount of money stipulated therein. As a good faith guaranty, Adams agreed to deliver 50,000 shares of Sulphur Springs stock to be held by trustees named in the agreement, to be forfeited in the event he failed to perform. The parties signing the agreement, other than Adams, agreed to turn over to appellees their shares of stock and evidences of debt designated; appellees in turn were to deliver the same to Adams upon his

performance, they to make disbursements to the persons entitled thereto as set forth in the agreement.

The persons signing the contract with Adams agreed, upon performance by him, to release him from any obligation which they might have had against him as stated in the contract. Adams agreed that if he failed to perform at the end of six months, he would deliver 200,000 shares of Sulphur Springs stock to two named trustees, of which appellant was one, and in the event that he failed to deliver stock in said amount, that they would have the right to vote stock in the amount of 200,000 shares for a period of two years dating from such time when delivery should have been made. Adams agreed not to interfere with the operation of the board of directors of Sulphur Springs, nor to commence any action against them within a period of two years. The parties contracting with Adams agreed, in the event of his failure to perform, to cause Sulphur Springs to assume and pay certain obligations stated therein running to third persons.

A special provision was put into the contract as follows:

“That this agreement shall be binding on each and every individual who signs the same to the full extent of his obligation undertaken in this agreement, and no other.” (Italics ours.)

The final provision of the contract covered attorneys fees to be paid appellees for their services, the provision thereof being couched in the following language:

“The said party of the first part (Adams) does also agree that the law firm of *Cullen and Etter*, 726 Paulsen Building, Spokane, Washington, *shall represent and shall perform all such services* as may be necessary in the effectuation of any part of this agreement relative to the settlement thereof by the parties of the second part and relative to the operation during the period so specified herein of the Sulphur Springs Gypsum Company; and said attorneys may accept in trust, if offered, other claims for payment by said party of the first part, including shares of stock in the said Sulphur Springs Gypsum Company, notes signed by the company or the first party, or other evidences of indebtedness so signed; and the first party does hereby agree that the services of such named attorneys shall be a legitimate claim which shall be paid at the time set for performance for the payment of claims herein by the party of the first part; and it is likewise agreed by said party of the first part that such claims shall be entitled to payment to the extent of *not less than \$4,000.00*, subject to such revision as may be necessary for work done by said attorneys *which is not now contemplated by this agreement.*” (Italics and contents of parenthesis ours.)

Appellant either failed or refused to sign Exhibit 5-15. (Tr. 98, 102.) He dealt directly with Adams, entering into an option agreement with him on the 5th day of April, 1948. (Ex. 6, Tr. 50, 99.) Appellees were informed of such fact. (Tr. 98.) The option agreement was prepared by a layman, a former partner of appellant, and submitted to appellant's attorney, W. J. Nixon, for his approval. (Tr. 139.) Appellees had nothing to do with the framing or preparation of any document incident to the consumation of appellant's

sale of Wyoming Mineral Products Company's business and assets to Adams. (Tr. 102.)

Within the six-month period specified in Exhibit 5-15 for performance, Adams notified appellant and appellees that he was ready to perform the terms of that contract and the option agreement (Ex. 6), the closing of which was to take place at Billings, Montana. (Tr. 64.) Adams had found a capitalist who put up \$175,000.00 for the purpose of acquiring the entire business of Sulphur Springs and Wyoming Mineral Products Company, "lock, stock and barrel."

Appellant, at the request of the president of Sulphur Springs, who was not available, asked appellees to attend the closing of the transaction at Billings for the purpose of transferring the assets of Sulphur Springs to the new purchaser. (Tr. 101.) Appellees were provided expense money by Sulphur Springs in the sum of \$150.00. (Tr. 63.) Cullen, one of appellees, went to Billings on behalf of Sulphur Springs and on behalf of those stockholders who had deposited stock or evidences of debt with them. (Tr. 53.)

Appellees were paid \$88,400.00, which amount equalled the sums due their clients plus interest at 6% as stipulated in Exhibits 5-15, and an attorneys fee of \$4,000.00 (Tr. 54, 69), to the exclusion of payments made on appellant's option agreement, Exhibit 6.

Appellees received as an attorneys fee resulting from the transaction a sum in excess of \$6,000.00. (Tr. 69.)

The additional amount above the stipulated \$4,000.00 was contributed to them gratuitously by those who signed Exhibit 15.

Appellant received \$52,316.00 in exchange for his performance of the option agreement, Exhibit 6, had with Adams. (Tr. 167.) The above amount was made up of \$16,618.00 in cash and two personal notes of Adams in the sum of \$10,000 and \$2,000, respectively, one of which was delinquent at the time of trial. (Tr. 151.) \$23,698.00 of the above amount was derived from an amply secured mortgage debt running from a copartnership named Anderson Brothers to the Wyoming Mineral Products Company. (Tr. 151.) Wyoming Mineral Products Company was possessed of a value of between \$60,000 and \$100,000. (Tr. 140, 144.) (*Appellant paid a former one-half owner of that corporation, a year prior to this transaction, \$26,000 for his one-half interest in the corporation.*)

Appellant did not have a claim in controversy with either Sulphur Springs or H. J. Adams. He did not gain from the transaction, but sustained a substantial loss therefrom. (Tr. 151-152.) He was impelled to take such loss because of failing health. (Tr. 158.)

At the conclusion of the taking of testimony on behalf of appellees, appellants made a motion for a directed verdict. (Tr. 122.) This motion was denied by the trial court. At the conclusion of the taking of all of the testimony in the case, appellants again made a motion for a directed verdict, which motion was denied. (Tr. 170.) The jury returned its verdict in favor of

appellees in the sum of \$4,000.00 (Tr. 10.) A motion for judgment *n. o. v.* or in the alternative for a new trial was timely made on behalf of appellants, and was denied by the court below. (Tr. 12, 24.) A judgment on the verdict was made and entered (Tr. 11) from which judgment this appeal is prosecuted. (Tr. 25.)

SPECIFICATIONS OF ERROR

1. The trial court erred in denying appellants' motion for a directed verdict made at the conclusion of appellees' case in chief. (Tr. 122.)

2. The trial court erred in denying appellants' motion for a directed verdict made at the conclusion of the taking of all of the testimony in this case. (Tr. 170.)

3. The trial court erred in denying appellants' motion for judgment *n. o. v.* (Tr. 24.)

4. The trial court erred in denying appellants' alternative motion for a new trial. (Tr. 24.)

5. The trial court erred in making and entering judgment on the verdict in favor of appellees. (Tr. 11.)

6. The trial court erred in admitting Exhibit 1. (Tr. 44.) Objection was made thereto on the ground that it was incompetent and immaterial. (Tr. 44.) The exhibit consisted of five pages of unsigned typewritten matter with a number of marginal writings.

7. The trial court erred in admitting over objection Exhibit 2. (Tr. 45, 46.) Objection was made thereto on the same ground as was made to Exhibit 1. (Tr. 46.) This exhibit was likewise unsigned.

8. The trial court erred in admitting over objection Exhibit 3. (Tr. 46.) Objection was made thereto

on the ground that it was incompetent and immaterial. (Tr. 46.) This exhibit was an unsigned draft of a proposed contract. (Tr. 46.)

9. The trial court erred in admitting over objection Exhibit 4. (Tr. 47.) Objection was made thereto on the ground that this exhibit was incompetent, irrelevant and immaterial. (Tr. 47.) It consisted of unsigned, typewritten sheets of paper.

10. That the verdict of the jury and judgment thereon is excessive.

SUMMARY OF ARGUMENT

Appellees' alleged contract of employment arose in the State of Washington. Such being so, substantive rights thereunder are governed by Washington law.

Legal services rendered by appellees were performed in pursuance of a clear, unambiguous written contract of employment (Ex. 5-15) fixing a fee therefor. Appellees acted upon the contract, Exhibit 5-15, thereby adopting it as their own, and were bound thereby. They were paid in full in accordance with the terms of that contract prior to the trial of this case.

Where a written contract is clear and unambiguous, it is a rule of *substantive law* that the terms thereof may not be varied by parol testimony. Appellees having alleged a contract of employment with appellants, the burden was on them to prove the same.

Appellees failed to establish that the relationship of attorney and client existed between the parties other than as disclosed in Exhibit 5-15. But if such could be gleaned from the evidence in this case, it was terminated by appellants before the rendition of services by appellees.

Under the law of the State of Washington a client may terminate the relationship of attorney and client without cause. Upon such termination, an attorney is entitled to the reasonable value of services rendered prior to termination of the employment. In this case,

there is no evidence of services rendered before termination, which occurred when appellees were notified that appellants were dealing directly with Adams.

The testimony of appellees concerning Exhibits 1 to 4 consisted merely of conversations and actions antedating the written contract of employment, Exhibit 15. At most they were negotiations looking to a contract, and became merged therein, and the court committed prejudicial error in admitting such exhibits for the stated purpose of showing the amount of labor performed by appellees.

Appellant, Casey's, transactions with the appellees was in his capacity as a director of Sulphur Springs and appellants by reason thereof would not be individually bound thereby

Even though appellants may have benefited by legal services rendered by appellees for the corporation or other stockholders, such fact did not create a legal obligation on the part of appellants to pay therefor.

Appellees did not render any services other than those contemplated in Exhibit 5-15. The effect of the judgment is to award appellees double payment. Four thousand dollars is grossly in excess of what a reasonable fee would be in any event, taking into consideration the kind and nature of the services rendered, and the result.

ARGUMENT

I.

We first address ourselves to Specifications of Error 1, 2, 3, and 5.

It is our contention that the trial court should have decided as a matter of law at the conclusion of appellees' case in chief, and in any event at the conclusion of the taking of all of the testimony in this case, that appellants were not indebted to appellees.

Preliminary to a discussion of this broad contention, which if sustained by this Court is determinative of the issue, we would respectfully direct your attention to principles of law which we believe are applicable.

The contract sued upon is alleged to have been created in the State of Washington. Such being so, local law of Washington controls in all substantive matters inherent therein.

Spellman v. Bankers Trust Co., 6 F (2d) 799.

Under local law, a client has a right to discharge an attorney without cause at any time.

"Attorneys are but representatives of the parties. Their authority is revocable at any time at the pleasure of the client, and they cannot legally object to any course their client may take concerning the matter in controversy." *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110 Pac. 989.

Hamlin v. Case & Case, Inc., 188 Wash. 150, 61 P. (2d) 1287.

When the fee is not fixed and the contracted services have not been fully performed, upon such discharge, the client is obligated to respond to the attorney in *quantum meruit*. *Ramey v. Graves*, 112 Wash. 88, 191 Pac. 801; *Wright v. Johansen*, 132 Wash. 682, 233 Pac. 16.

Where an attorney is informed that his client is not availing himself of his proffered services, but is dealing directly or through other persons in connection with the subject matter, such would be effective notice of an intention on the part of the client not to avail himself of such proffered services, and in the event of an employment having theretofore been effected, such would be a sufficient notice of its termination. *Wright v. Johansen*, 132 Wash. 682, 233 Pac. 16.

Where a written contract is clear and unambiguous, it may not be varied by parol testimony, *even though testimony is offered without objection* which if believed would vary its terms, the rule being that the parol evidence doctrine is part of Washington's substantive law. *Dennison v. Harden*, 29 Wn. (2d) 243, 186 P. (2d) 908; *Mead v. Anton*, Vol. 133 Wash. Dec., No. 12, p. 713.

Where a party acts upon or adopts a contract, he is bound thereby as effectively as if he signed the same.

“Although respondents did not sign the contract, by its terms it was made for their benefit; they accepted it and acted upon it, which made it their contract as effectively as if they had signed it. 13 C. J. 305; *Hunter v. Byron*, 92 Wash. 469, 159 Pac. 703.” *Miskey v. Mazey*, 150 Wash. 676, at 681, 274 Pac. 698

“It is not necessary that a party should deliberately agree to be bound by the terms of a contract to which he is a stranger, if, having knowledge of such contract, he deliberately enters into relations with one of the parties, which are only consistent with the adoption of such contract. If a person conducts himself in such manner as to lead the other party to believe that he has made a contract his own and his acts are only explicable upon that theory, he will not be permitted afterwards to repudiate any of its obligations. 2 *Pom. Eq. Juris*, Sec. 965; *Chicago & A. R. Co. v. Chicago V. & W. Coal Co.*, 79 Ill. 121.” *Great West. Theater Equip. v. M. & E. Theaters*, 164 Wash. 557 at 561, 3 P. (2d) 1003.

DeBritz v. Sylvia, 21 Wn. (2d) 317, 150 P. (2d) 978.

Persons acting for and on behalf of a corporation as officers thereof, and within the scope of their authority, do not bind their separate estates in the absence of a specific contract so to do. 13 *Am. Jur.* (Corporations) Sec. 1044, p. 988.

Third persons incidentally benefited by legal services rendered to a corporation or stockholders thereof are not legally bound to pay for such services. 5 *Am. Jur.* (Attorneys at Law) Sec. 155, p. 352.

An agreement made by a client with his counsel, after the latter has been employed, by which the original contract is varied and greater compensation is secured to the counsel, is invalid. 5 *Am. Jur.* (Attorneys at Law) Sec. 161, p. 358.

When we apply the foregoing principles of substantive law recognized in Washington to the facts in this case, giving due allowance to them and every reasonable inference to be drawn from them, it appears to us to be clear that appellants cannot legally be held to respond to appellees.

The most that appellees showed by their testimony was: (1) that they were practicing attorneys (Tr. 37, 84); (2) that they were approached by directors of a corporation looking to their ultimate employment by it (Tr. 38, 86); (3) that they were retained by the corporation to give it advice and consultation (Tr. 86); (4) that they advised a course of procedure to the directors (Tr. 43, 87); (5) that preliminary negotiations were had with Adams which ripened into a contract between Adams and some of the directors (Tr. 61); (6) that the contract provided for attorneys fees to be paid to appellees and specified that appellees were to perform "all legal services" incident thereto (Tr. 61, 62, 96); (7) that subsequent to the contract they knew that appellants were dealing directly with Adams (Tr. 98); (8) that appellees were asked to go to Billings (Tr. 101); (9) that they performed services while there incident to Exhibits 5-15 (Tr. 64); (10) that appellees did not perform services other or different from those

contemplated in the contract (Tr. 64, 70, 71, 72); and (11) that they were paid before the trial of this case, more than the fees stipulated in the contract, Exhibit 5-15 (Tr. 63).

Statements made to Cullen and Etter, and conversations had and testified to by them and by the witnesses Davis and Kienholz, antedating the contract, Ex. 5-15, have no evidentiary effect under Washington law for the purpose of varying the terms of Exhibit 5-15. Appellees right of recovery is controlled by their written contract, Exhibit 5-15.

The fact that appellant asked Etter to go to Billings for the purpose of assisting in closing the transaction is not evidence of a contract of employment between him and appellees. It was appellant's obligation as a director of Sulphur Springs to see to it that the purchaser legally received that which he was buying from Sulphur Springs. It was the duty of appellees, under their retainer from Sulphur Springs to supervise the transfer of its assets to the new purchaser. Appellees were paid, in addition to their original retainer of \$500.00, \$150.00 by the corporation for such purpose. Mr. Cullen consumed one day's time taking care of routine matters in connection with the transfer of Sulphur Springs stock and assets at Billings. The services rendered by appellees in essence consisted of nothing more than office consultation and scrivener work. The contract, Exhibits 5-15, was the product of Mr. Huntington, a Montana attorney representing Adams,

and appellees (Tr. 126). Appellees assumed no responsibility other than that ordinarily assumed by an escrow holder. The transaction did not present any novel or complex questions of law. Cullen's services at Billings did not change or alter the manner or method of performance of the contract. At Billings, Casey handled all matters pertaining to his option agreement, Ex. 6. Furthermore, he had received, before Cullen arrived in Billings, \$40,000.00 of money due him or his corporation, Wyoming Mineral Products Company, by virtue of his option agreement (Ex. 6).

Appellee, Cullen, testified concerning services performed at Billings, stating:

Q. (By Mr. Hawkins) What was the purpose of that trip?

A. To collect the money due on the assignment from the Sulphur Springs Gypsum Company to the new investors.

Q. Did that involve drawing corporate proceedings?

A. We drew minutes for the two directors,—in Spokane to have two new ones elected, and Mr. Casey went over to have a quorum present there.

Q. What did you do in Montana?

A. We had an all day's conference in the office of Mr. Huntington and I received a check to myself and Mr. Etter for \$88,400.00.

Q. For \$88,400.00?

A. Yes, sir.

Q. What was that for?

A. *To represent the interest of everyone on the contract except Mr. Casey.*

Q. Did you receive any other check?

A. Yes, sir, it was handed to me.

Q. What was that?

A. \$16,800.00 made out to Mr. Casey.

Q. By whom was it handed to you?

A. Mr. Charles Vandenhook.

Q. You gave it to Mr. Casey?

A. Yes, sir.

Q. Had he previously received any money?

A. A substantial amount before we went to Montana.

Q. How much?

A. He told me about \$40,000.00.

* * * * *

Q. After these moneys were paid over did you have a conversation with Mr. Casey that day?

A. We had several conversations, one immediately after the money was paid over and we turned over the books and seal and stock that I had in my possession, to Mr. Huntington who represented the new Company.

Q. Was there any money transferred?

A. Mr. Casey turned over the funds he had in his possession of the Sulphur Springs Gypsum Company.

Q. Do you remember the amount of money?

A. Slightly over twenty-six hundred dollars.

Q. Were all of the assets of the Sulphur Springs Gypsum Company turned over to the new company at that time?

A. All the assets and obligations were turned over. (Tr. 53-56.) (*Italics ours.*)

Mr. Cullen further testified on cross-examination as follows:

Q. (By Mr. Young) Following the entering of the contract under these terms Mr. Adams went out and procured a buyer and then notified you that he was ready; that the buyer had cash arranged for and that all that was left for you to do was go to Billings, get the money and have it paid over to you, and you in turn pay it to the people whom you represented?

A. *That is correct*, but it was not as easy as you make it sound.

Q. What difficulty was there; Mr. Adams put up the money, or arranged to have you given the money and all you had to do was to make the proper receipt and put it in the bank account and pay it out to the people you represented. That was all there was to it?

A. No.

Q. What else?

A. When we got to Billings,—well, before we got to Billings several things came up, and then we spent a whole day in Billings fighting and wrangling, and at lunch there was better than fifty per cent of the people that would not—

Mr. Young: Just a moment Mr. Cullen.

Q. Isn't it a fact that Mr. Casey had forty thousand dollars of these people's money so that they couldn't back out?

A. Yes, he told me he had forty thousand dollars.

Q. And they paid you the money and you put it into your account and paid it out to the clients you represented, that is, you paid them the amount you thought was coming to them, or the amount you thought was their share, isn't that correct?

A. Not what I thought was their share, what they said was their share. (Tr. 64, 65.) (Italics ours.)

From the foregoing testimony it is clear that Cullen's presence in Billings was in the interests of the Sulphur Springs Gypsum Company and persons who had delivered to appellees shares of stock and evidences of debt running from Adams or Sulphur Springs.

II.

THE COURT ERRED IN ADMITTING
EXHIBITS 1 TO 4

We now address ourselves to Specifications of Error 6, 7, 8, and 9.

Appellees tried this case in the court below on the theory that they had a contract of employment between themselves and appellants; that the purpose of the employment was the *collection* of approximately \$75,000 alleged to be due appellants from Adams; that such sum was in dispute; that as a result of their efforts a collection thereof was effected, and that they were entitled to a reasonable fee for their services, which they alleged to be in the sum of \$15,000.00. (Tr. 2-5.)

Appellees, over objection, offered and were permitted to introduce as exhibits, Ex. 1, 2, 3, and 4. Each of these exhibits were preliminary drafts of a contract ultimately arrived at with Adams. (Tr. 44-48.) *The court stated that he was admitting the exhibits referred to for the purpose of showing the amount of labor performed by appellees.* (Tr. 46.) To the lay mind of the jury, these exhibits undoubtedly were evidence of prodigious effort on the part of appellees. The labor represented by those exhibits was not expended at the request of appellants for their benefit, but to the contrary, was at the request and for the benefit of the board of directors of Sulphur Springs. (Tr. 42-44.)

The documents referred to were preliminary scrivener efforts leading to and ultimately resulting in the final draft of a form of contract, Exhibit 5, which is identical with Exhibit 15 save the latter is an executed copy. (Tr. 127.)

Appellees, at the outset, were employed by the board of directors of Sulphur Springs for the purpose of advising them how best to proceed in dealing with Adams. (Tr. 38.) They asked and were paid a \$500.00 retainer fee covering such service. (Tr. 93, 94, Ex. 14.) The purpose of the employment was to examine the books of the company and "to discuss the Sulphur Springs Gypsum set-up and what could be done about Mr. Adams." (Tr. 38.) Appellees' employment initially was brought about through the recommendation of a director named Simanton. (Tr. 146.) Simanton delivered to appellees an audit of Sulphur Springs' books. Appellees, under the retainer, examined the books, records and documents of Sulphur Springs. (Tr. 39.) They were then asked for their recommendation:

Q. (By Mr. Hawkins) Now, what was recommended?

A. (By Mr. Cullen) On Saturday, March 5, Mr. Busch, Casey, Keinholz and Davis came to the office at about two o'clock. We went over what we found in the audit; Mr. Casey advised us that he would ask Mr. Adams to come up, and a few minutes after, he came up.

Q. Did you have a meeting with Adams?

A. Yes, we did. He adopted the attitude that as long as he owned the majority of the stock he felt that he could do pretty much as he wanted to. * * *

* * * * *

A. It was agreed by Mr. Adams that he would like to take over the Company and would make an attempt to liquidate what these people had in the Company. (Tr. 41-42.)

* * * * *

A. After Mr. Adams left we told Mr. Casey, Mr. Busch, Mr. Davis and Mr. Keinholz that they could not,—we advised them that in effect they couldn't do anything as Directors and that we would represent them as individuals—

Q. Why couldn't you represent them as directors?

A. They couldn't use the Company funds to get their own money back.

* * * * *

Q. And what did you recommend?

A. That a contract be drawn up with Mr. Adams to pledge a number of shares of his stock to represent that he would pay them off, or turn over to a voting trust all of the shares of stock he controlled. (Tr. 42-43.)

And then with reference to Exhibit 1, the following occurred:

Q. (By Mr. Hawkins) Handing you plaintiff's exhibit 1, will you state what it is?

A. (By Mr. Cullen) That is the first contract we drew up looking toward a liquidation of the individual's investments in the Sulphur Springs Gypsum Company.

Q. Was that drawn at the request of Mr. Casey and his associates?

A. Yes, sir, it was. (Tr. 41, italics ours.)

Then with respect to Exhibit 2, the following occurred:

Q. (By Mr. Hawkins) Now, Mr. Cullen, you have been handed plaintiff's exhibit 2. State what it is?

A. That is the draft which was a result of the conversation held on this contract with *various members*,—rather *with various individuals we represented*.

Q. Exhibit 2 is a result of the conferences after drawing number 1?

A. That is correct. (Tr. 45.)
With respect to Exhibit 3, the following occurred:

Q. (By Mr. Hawkins) Now, Mr. Cullen, handing you exhibit number 3 I will ask you to state what that is, if you know?

A. That is two sheets from the contract we drew concerning this same matter. This was taken up in Mr. Casey's presence. At that time *Mr. Adams had a lawyer from Billings* to represent him.
* * *

* * * * *

MR. HAWKINS: I offer exhibit marked 3 in evidence at this time.

MR. YOUNG: I am making the same objection, however, in view of the statement of the Court, I understand none of these documents are binding on my client.

THE COURT: *These are just to show the amount of labor done in order to arrive at a fair fee. It may be admitted for that purpose. The same ruling applies to the other exhibits. (Tr. 46, italics ours.)*

In connection with Exhibit 4, the following occurred:

Q. (By Mr. Hawkins) Handing you exhibit number 4, will you state what that is?

A. Yes, sir, this is the contract *immediately preliminary to the final draft*. We went over this in the presence of *most all of the people we represented, including Mr. Casey and also Mr. Huntington and Adams.* * * *

* * * * *

Q. Mr. Huntington went over this with you; he representing Mr. Adams?

A. Yes, sir.

Q. Mr. Davis, Mr. Keinholz, Mr. Casey and Mr. Busch were present?

A. Yes, sir.

Q. And had copies of this instrument?

A. Yes, sir.

Q. And actively participated in the discussion of the points involved?

A. Yes, sir. * * *

MR. HAWKINS: We offer this exhibit in evidence.

MR. YOUNG: The same objection I have heretofore made. It is incompetent, irrelevant and immaterial.

THE COURT: It may be admitted for the same purpose as the other exhibits. (Tr. 47-48, italics ours.)

From the testimony of Mr. Cullen it conclusively appears that the labors represented in the preparation of the various documents, Exhibits 1 to 4 inclusive, were not solicited to be done at the request of appellant, Casey, but rather at the request of the directors and stockholders of Sulphur Springs, *including Adams, who owned or controlled more than a majority of its corporate stock*. To admit these documents for the purpose of forming a basis from which the jury could determine the reasonableness of a fee to be charged appellants was prejudicial to them and constitutes, in our opinion, reversible error. This should be doubly true where appellees were paid for such services by Sulphur Springs, and as noted hereinabove, they, by acting upon Exhibit 5-15, adopted such contract, and in Paragraph 12 thereof limited their fee "*to the extent of not less than \$4,000.00, subject to such revision as may be necessary for work done by said attorneys which is not now contemplated by this agreement.*"

THE RECORD IS SILENT AS TO ANY WORK DONE BY APPELLEES WHICH WAS NOT CONTEMPLATED BY THE AGREEMENT, EXHIBIT 5-15. THEY WERE PAID \$6,000.00 BEFORE THE TRIAL OF THIS CASE. (Tr. 63.)

VERDICT AND JUDGMENT THEREON IS
EXCESSIVE

We here address ourselves to the final assignment of error, No. 10.

It has been repeatedly said by writers of judicial opinions that the appellate court is not bound by the opinions of friendly experts nor by the judgment of the trial court as to what constitutes a reasonable fee in given cases.

“Appellate courts are themselves experts as to reasonableness of attorneys fees, and may, in the interest of justice, fix fees of counsel, albeit in disagreement on the evidence with the views of the trial court.” *Columbian Life Insurance v. Keyes*, 138 F (2d) 382, footnote. *Merchantile-Commerce B. & T. v. Southeast Ark. Levee*, 106 F. (2d) 960.

The appellate court is as well able to determine the reasonable value of legal services as is the trial court, and it is uninhibited in drawing its conclusion with respect thereto in relation to the facts. *Tracy v. Spitzer-Rorick Sav. & Tr. Bank*, 12 F (2d) 755; followed in *Tracy v. Spitzer-Rorick Tr. & Sav. Bank*, 12 F (2d) 758.

Appellees themselves attempted to break their legal services into two parts; one, services rendered the corporation which they contend were covered by their retainer of \$500.00 (Tr. 63, 86-87), and two, those concerned with the negotiation for and preparation of

Exhibit 5-15. Aside from the trip to Billings, these services were all office in character. No litigation was undertaken or agreed to be undertaken by them. As hereinabove stated, their professional labors were the giving of office consultation, drafting of a contract and supervision of the execution of that contract, and transfer of assets therein agreed to be transferred. The responsibility they assumed was little, if any—no greater than that ordinarily assumed by a lawyer who undertakes to set down in legal form a contract arrived at by contracting parties. These services covered but a short period of time. They were all rendered between February 13 and May 6, 1948. In the absence of a specific contract fixing the amount of the fee, it would have been unconscienable to allow them a sum in excess of \$1,000.00 for all of their services upon the evidence in this case. They have been paid \$6,000.00, \$4,000.00 of which was received by specific agreement; an additional \$2,000.00 as a gratuity. To increase their fee to \$10,000.00 by allowing this judgment to stand would be profligate in our opinion.

We submit that this Court should reverse the judgment of the trial court and direct it to dismiss the complaint of appellees with prejudice, or in the alternative that this Court should order and direct a new trial, or that this Court reduce the judgment obtained to an amount which in the opinion of this Court would be a fair and reasonable attorneys fee to be allowed appellees under the evidence in this case.

Respectfully submitted,

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United States
Court of Appeals
For the Ninth Circuit

W. L. CASEY and AGNES CASEY,
Appellants,

vs.

R. MAX ETTER and WILLIAM
E. CULLEN,

Appellees.

No. 12287

Brief of Appellee

*On Appeal From the District Court of the
United States for the District of Idaho,
Northern Division*

HON. CHASE A. CLARK, *Judge*

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FILED

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PAUL P. O'BRIEN

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United States
Court of Appeals
For the Ninth Circuit

W. L. CASEY and AGNES CASEY,
Appellants,

vs.

R. MAX ETTER and WILLIAM
E. CULLEN,

Appellees.

No. 12287

JURISDICTION

The Statement in Appellants brief is accepted.

STATEMENT OF THE CASE

This is an action by the law firm of Cullen and Etter of Spokane, Washington, against W. L. Casey and wife of Bonners Ferry, Idaho, upon an oral contract of employment for legal services rendered. It was tried before a jury under a general denial by the appellant, and a verdict of the jury was returned finding that the reasonable value of appellees' legal services for the appellant was \$4,000.00.

This employment arose out of these facts:
A company known as the Sulphur Springs

Gypsum Company was organized as the result of promotional efforts of one H. J. Adams. His method of finance was to obtain cash advances rather than to sell stock, and W. L. Casey along with the witnesses Albert Keinholz, Frank H. Davis, and others, made cash payments to Adams for the purpose of developing the Sulphur Springs Gypsum Company.

After the lapse of some time and numerous efforts to reconcile the financial status of the company, Casey and other similar investors became alarmed. Adams owned and controlled the majority of the stock and resultingly directed the affairs of the company. The investments of Casey, Keinholz, Davis and others were substantial, and particularly those of Mr. Casey. These investors made some investigation and in the course thereof were placed upon the Board of Directors by Mr. Adams, and given stock, apparently without consideration therefore, so as to qualify them to sit as Directors.

One of the first actions of that Board of Directors was to cause an audit to be made of the books of the company. This audit apparently reflected a condition which required, in the opinion of the Directors, immediate attention.

Casey and the other Directors consulted with other law firms in order to ascertain what could be done to rectify the affairs of the company and protect their individual investments. In view of the fact that Adams had control of the stock, these men, as directors, were advised that little, if anything, could be done to protect their individual investments.

The directors, including Casey, were then advised to seek the services of the law firm of Cullen and Etter. This was done and after an inspection of the books and the affairs of the company, Cullen and Etter rendered their opinion to the Directors. For these services Cullen and Etter were paid \$500.00 by the company.

Among other advices given, Cullen and Etter stated to these directors, including Casey, that as individual investors, secured by notes and other evidences of indebtedness, they could not use the company funds nor their offices as directors in an endeavor to recover individual investments and must proceed in their individual capacities else they would be violating their fiduciary relationships.

Out of this advice, there arose the oral contract involved. Cullen and Etter asked each

individual if they wanted to retain the services of Cullen and Etter in an individual capacity and proceed to collect back their respective investments. Each was asked if that was their individual desire, each replied in the affirmative. It is that contract of employment and the reasonable value of services rendered thereunder which is involved in this action.

Keinholz, Davis, and others paid Cullen and Etter for the legal services rendered under that oral contract of employment for the recovery of their respective investments. Casey recovered approximately \$70,000.00, admitted a liability for attorneys fees, and promised to come in and "straighten up" which he never did and therefore this law suit was instituted.

The Court submitted this proposition to the jury in the following language:

"This case has been ably tried and the question you are to pass upon is relatively simple; the evidence in some regards has taken a rather wide range, but after all has been said the question for you to decide is: "Was there a contract between the plaintiffs and this defendant, and I do not mean by that a written contract, . . . If you determine that there was such an agreement, then you will come to the question; did the plaintiffs render the service; if you determine that they did; then

you come to the question of the amount they are entitled to receive as compensation for those services.”

The jury considered the foregoing and other instructions, to which the appellant had no objection, and rendered a verdict in favor of the appellees and against the appellant, in the amount of \$4,000.00.

OBSERVATION

As an observation, the appellees contend and the Court considered that all exhibits introduced by both parties to this action were admitted in evidence solely for the purpose of showing the work done and the value thereof. The exhibits were not admitted in evidence as proof of a contract between the parties to this action. Nor is the content of such instruments material to the determination of the issues of this case.

AUTHORITIES

The trial court did not err in denying appellant's motions for a directed verdict, for judgment n. o. v., for motion for a new trial or in making and entering judgment on the verdict in favor of the appellees.

U. S. vs. 3969.59 acres of land
56 F. Supp., 831.

Carson vs. Talbot, 129 P. 2d

901, 64 Idaho 198 (and cases cited therein).

Exhibits 1, 2, 3, and 4, were admitted solely for the purpose of showing work done and not as evidence of a contract of employment.

The verdict of the jury and judgment thereon was not excessive and is sustained by competent evidence and will not be disturbed on appeal where it is sustained by any evidence.

The Supreme Court of Idaho has uniformly held that where the facts

“might very well lead different minds to reaching different conclusions upon the issue presented; and where such is the case, however meager the evidence, if it is of a substantial nature and character, the findings of the triers of fact should prevail.”

Smith vs. Clearwater County
et al. 65 Idaho 271, 278,
143 P. 2d. 561.

Hagan & Cushing Co. vs. Washington
Water Power Co. (C. C. A. 9th Crt.)
99 Fed. 2d. 614, 617.

“The jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and a verdict will not be disturbed if supported by substantial and competent evidence.”

Poulsen et al vs. New Sweden Irr.
Dist. 67 Idaho 177, 174 Pac.
2d. 206.

An attorney suing on quantum meruit for professional services may show not only the nature and character of services rendered and the result attained, but may show also his standing in the profession for learning, skill, proficiency and experience, and in determining the amount of the fee, it is proper to consider the time and labor required, the novelty and difficulty of the questions involved; the skill required to properly conduct the case, and the amount involved in controversy.

Levine vs. Berry, 195 P. 1003,
(Wash.)

Stanton et al vs. Embry, 93 U. S.
548. 23 L. ED. 983.

Shufeldt vs. Hughes, 104 P. 253,
257 (Wash.)

See Annotation 143 A. L. R. 672.

SUMMARY OF EVIDENCE

Reference is made to the foregoing, and repetition thereof will be avoided.

Your attention is particularly invited to the brief testimony of Frank H. Davis (Tr. 106-111) and Albert Keinholz (Tr. 111-115).

These witnesses stood in the same positions as directors and individuals as did Mr. Casey. They recognized the existence of the same oral contract with Cullen and Etter and performed thereunder, by accepting the benefit of the legal services of Cullen and Etter and paying

therefor.

Casey accepted the benefits of the legal services of Cullen and Etter by receipt and retention of benefits to the extent of about \$70,000.00.

As to the value of these services to Casey—the appellees, Cullen and Etter each fixed a value of \$15,000.00. Edward J. Lehan, an expert witness, after hearing the plaintiff's case fixed a value of \$15,000.00 but stated:

“I would qualify that if it was across the table dispute; . . . On the basis of \$12,500.00. (Tr. 118).

The only evidence submitted to the jury on the question of the amount of the fees was the testimony of Messrs. Cullen, Etter, and Lehan. The appellant offered no evidence or testimony in that connection. The jury, in the exercise of its collective judgment fixed the value of those services at \$4,000.00, and now, for the first time, appellant makes the unfounded claim that the amount is excessive.

VERDICT AND JUDGMENT THEREON IS NOT EXCESSIVE

As a result of the services of Cullen and Etter, Mr. Casey regained approximately \$70,000.00. This was his full investment in Sul-

pher Springs Gypsum Company. He cannot contend that the services of the appellees were not satisfactory, and admitted that:

“as soon as I get back to Spokane I will get hold of the other boys and tell them what a wonderful job you have done; I am going to pay you myself several thousand dollars.” (Tr. 56, 57.)

What other persons in the status of Mr. Casey paid to Cullen and Etter is of no concern in this action. Those people paid what the services of Cullen and Etter were worth to them. What Cullen and Etter’s services were worth to Mr. Casey was decided by the jury to be \$4,000.00.

“The wealth of a defendant cannot be considered in any case to enhance the fee for professional services above a reasonable compensation for the services actually rendered. It cannot be considered to make a fee extortionate or a compensation unreasonably large. But every judge and every gentleman of the bar knows that much severe professional labor is rendered by practicing attorneys without any compensation, and much more for compensation so small as to be entirely inadequate. It is as difficult to defend the poor as the rich from a groundless charge of murder. It requires as much learning, labor, and professional skill to recover or save from attack property of little value, that may be the entire estate of the poor man, as it does to recover thousands of dollars for the

wealthy. The duty of the lawyer to defend the former and maintain his rights is as great as it is to the latter, and to the honor of the profession it may be said that it is performed with equal zeal and fidelity. But it is the general practice of the gentlemen of the bar to fix the fees for such services far below a fair compensation or to charge no fee at all,—to measure their fees more by the inability of such a client to pay a fair compensation, or to pay at all, than by the value of the services they render. When, on the other hand, a client who has the means to pay what professional services are fairly worth employs an attorney, it is right and just that he should pay a fair and reasonable compensation for the services he obtains.

Ward vs. Kohn (C. C. A. 8th)
58 F. 462.

The Appellate Court will not disturb the verdict of the jury unless the award of such jury is so grossly disproportionate to a sum reasonably warranted by the facts as to shock the sense of justice and raise a presumption that it was the result of passion and prejudice.

Garrett vs. Taylor
(Idaho, unreported)
October 4, 1949.

It is respectfully submitted that this Court should affirm the judgment of the Trial Court

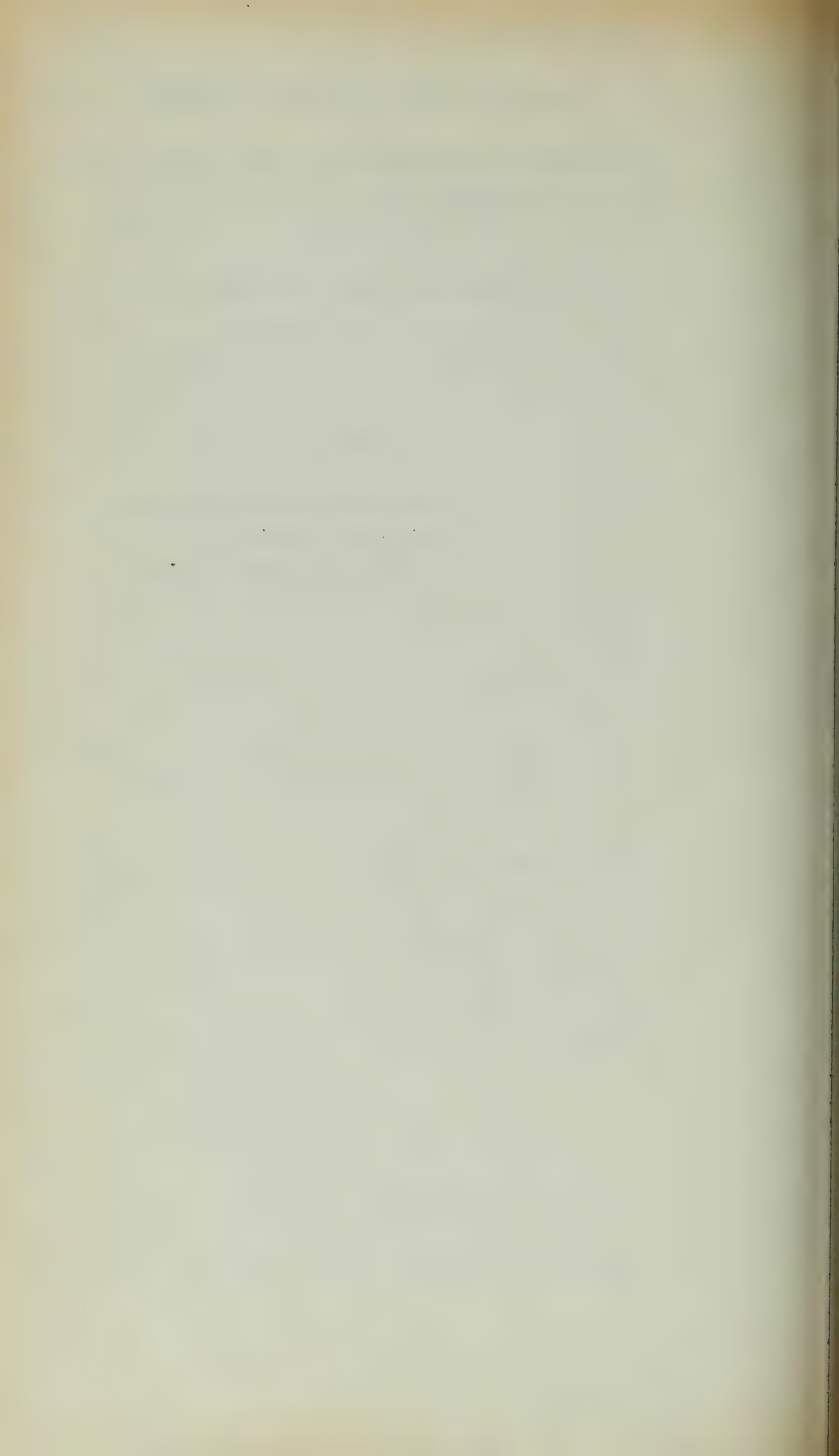
based upon the verdict of the jury in the amount of \$4,000.00.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit

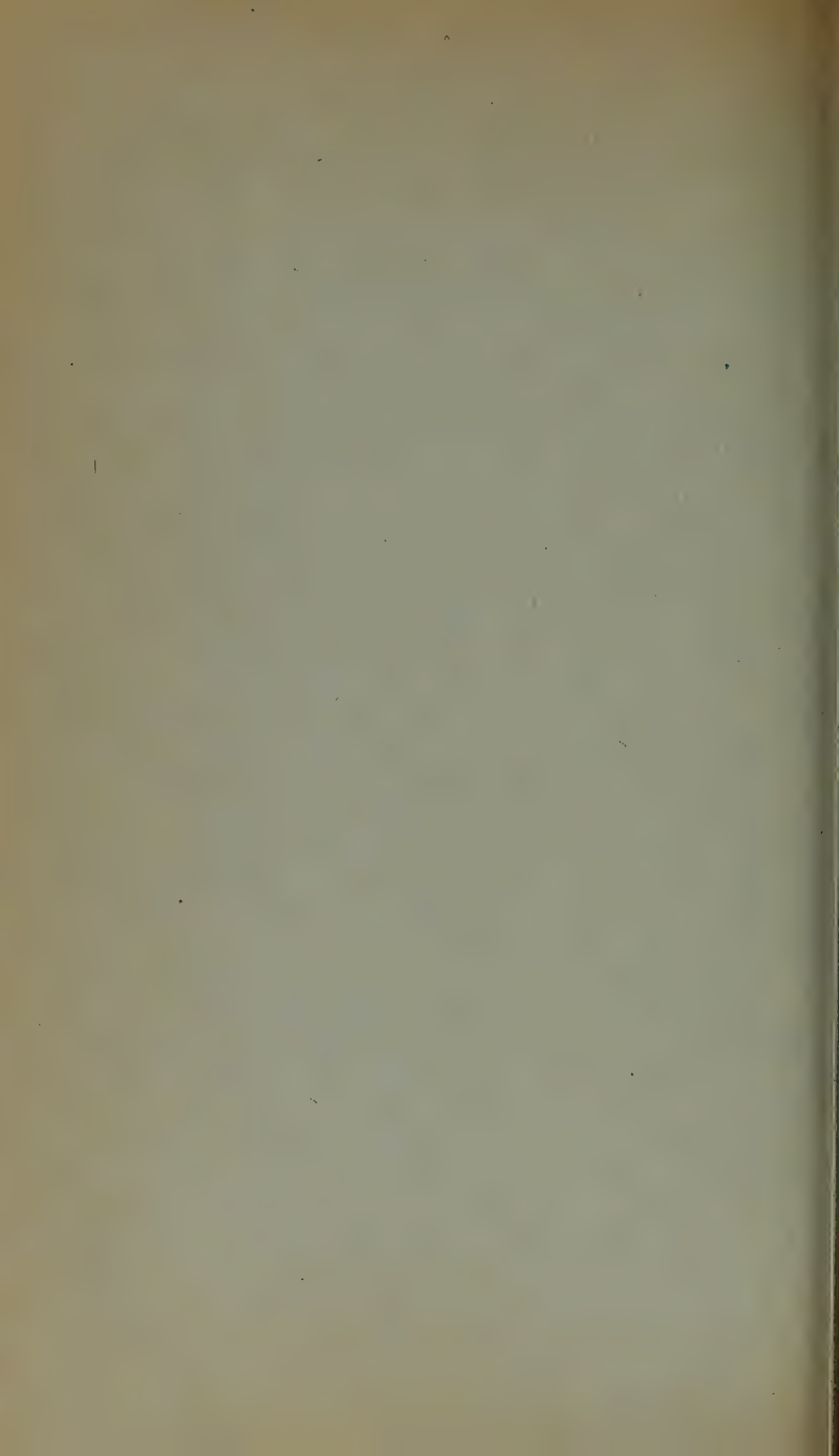
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| W. L. CASEY and AGNES CASEY, <i>Appellants,</i> | } | No. 12287 |
| vs. | | |
| R. MAX ETTER and WILLIAM E. CULLEN, <i>Appellees.</i> | | |

Reply Brief of Appellants

*On Appeal From the District Court of the United
States for the District of Idaho,
Northern Division*

HON. CHASE A. CLARK, *Judge*

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United States
Circuit Court of Appeals
For the Ninth Circuit

W. L. CASEY and AGNES CASEY,
Appellants,

vs.

R. MAX ETTER and WILLIAM
E. CULLEN,

Appellees.

No. 12287

Reply Brief of Appellants

*On Appeal From the District Court of the United
States for the District of Idaho,
Northern Division*

HON. CHASE A. CLARK, *Judge*

APPELLEES MISSTATE FACTS

Appellees say, page 4 their brief: "Casey recovered approximately \$70,000.00." And again at page 8 thereof, they say: "Casey accepted the benefits of the legal services of Cullen and Etter by receipt and retention of benefits to the extent of about \$70,000.00." We are not given the benefit of having pointed out to us that portion of the record establishing such fact. Our search of the record reveals no evidence substantiating the above quoted assertion.

The undisputed facts to which we direct your attention render such statement an absurdity. Appel-

lants had no stock interest in Sulphur Springs except 2,500 shares which were given to appellant, Casey, in order to qualify him to sit as a director of that corporation (Tr. 146). Appellants loaned to Sulphur Springs \$15,000.00 upon which there was a balance of \$14,000.00 due. This loan was secured by 23,500 shares of Sulphur Springs stock (Tr. 151).

Q. You turned over 23,000 shares of stock pledged as security for the balance of \$14,000.00?

A. That's right (Tr. 168).

In narrating his financial transactions with Sulphur Springs, appellant Casey's testimony, which is not disputed and which for your convenience we set forth here, establishes the erroneous statements of appellees above referred to.

Q. What did you do when you got to Billings?

A. I first got hold of Anderson Brothers who had a contract for mining the gypsum and then got hold of Mr. Sinton, who was putting up the money to get our deal put over. The Company said they wouldn't make the deal until they got my contract of distribution, and warehouses and machinery and equipment at Thermopolis that the Company owned.

Q. Did you arrive at a figure as to what you would take for your interest including the sales contract?

A. Yes, sir, I did.

Q. What in addition to the sales or distribution contract did you agree to yield up?

- A. Mortgage on the equipment that I had from Anderson Brothers at the time it was about \$23,000.00 that I had a mortgage for.
- Q. With respect to the mortgage, what was the value of the equipment that you had a mortgage on?
- A. That equipment was sold to Mr. George Sinton for seventy-one thousand dollars.
- Q. That mortgage is in evidence now?
- A. Yes, sir.
- Q. There was a balance of \$23,000.00 on it?
- A. \$23,698 balance on the mortgage.
- Q. The sales contract or the distribution contract, what was the value of that, in your opinion?
- A. The value of that at that time I would say was \$65,000.00 or \$70,000.00.
- Q. Did you have some stock of the Sulphur Springs Gypsum Company?
- A. Yes, sir, I also had a \$15,000.00 note on which there had been about a thousand paid, leaving a balance of \$14,000.00 for which I had to put up as security 23,500 shares of Sulphur Springs Gypsum stock.
- Q. Were you required as a part of the transaction to yield up that note and stock?
- A. Yes, sir.
- Q. What else did you yield up as a part of the consideration for what you were to be paid?

A. For a number of years I had dealers' advertising contract—sales book contracts for the dealers that I turned over to them.

Q. Were these properties required to be delivered from you to the new buyer?

A. That's right, they were (Tr. 150-151).

And again on cross-examination, appellant Casey testified, which testimony is not disputed, as follows:

Q. That is all the money you got?

A. That was all—

Q. —just a moment, Mr. Casey, that is all the money you got for the Wyoming Mineral Products Company or in the name of Casey?

A. \$40,000.00, the \$23,000.00 and the notes; \$40,416 cash was every dime I got out of it (Tr. 167).

A benefit was not conferred upon appellants. They were not unsecured creditors of Sulphur Springs. Aside from the item of \$14,000.00 the remainder of what they received as a result of the sale of Sulphur Springs was derived from the sale of all of the assets of the Wyoming Mineral Products Company, a corporation which appellants owned, and the payment to them or that company of a balance of approximately \$23,000.00 due on a mortgage indebtedness. As appears from the record (Tr. 140, 144, 150), which again is not disputed, the business of the Wyoming Mineral Products Company was reasonably worth in excess of \$60,000.00. The selling franchise which the Wyoming Min-

eral Products Company had was of great value providing as it did for substantial royalties (Tr. 139, 144, Ex. 16).

The transaction insofar as appellants were affected, reflects simply a sale of substantial properties and securities by them to a purchaser who was secured by Adams to buy the same in the performance of the contract, Exhibit 5-15. Such sale was conducted by appellant Casey in conformity with the terms of the option agreement, Exhibit 6.

DAVIS-KIENHOLZ TESTIMONY

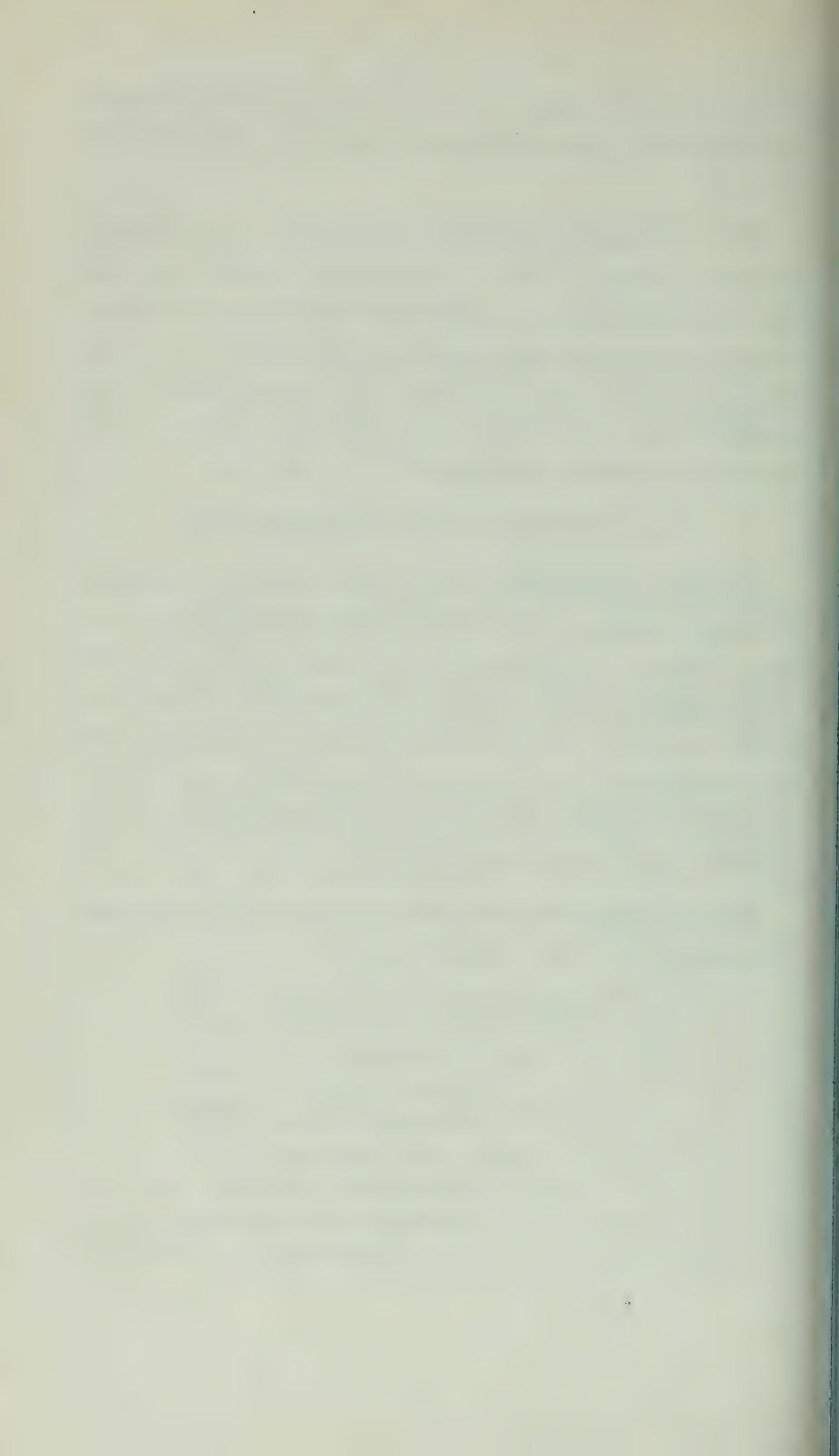
At page 7, appellees' brief, your attention is invited to the testimony of Frank H. Davis and Albert Kienholz. These two witnesses were stockholders of Sulphur Springs. They owned no properties other than their stock holdings. Their testimony at most amounts to a relation of conversations antedating the written contract, Exhibits 5-15, with liberal sprinkling of conclusions not founded on evidence.

We respectfully submit that the appellants should be sustained in their contentions.

Respectfully submitted,

W. J. NIXON,
Courthouse,
Bonners Ferry, Idaho,

GEO. W. YOUNG,
502 Paulsen Bldg.,
Spokane, Washington,
Attorneys for Appellants.



No. 12288

United States
Court of Appeals
For the Ninth Circuit.

KAJ THEILL and RAYMONDE M. THEILL,
Appellants,
vs.

CHARLES W. WHITLOCK,
Appellee.

Transcript of Record

Appeal from the United States District Court
Northern District of California,
Southern Division.

FILED

APR -5 1950

PAUL P. O'BRIEN,
Clerk

No. 12288

United States
Court of Appeals
For the Ninth Circuit.

KAJ THEILL and RAYMONDE M. THEILL,
Appellants,

vs.

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHRISTIN, KEEGAN & CARROLL,

550 Russ Building,

San Francisco, California.

Attorneys for Defendants and Appellants.

STEVENSON, CRAWFORD and SHOLARS,

578 Flood Building,

San Francisco, California.

Attorneys for Plaintiff and Appellee.

In the District Court of the United States for the
Northern District of California, Southern Division

No. 28206-R

CHARLES S. WHITLOCK,

Plaintiff,

vs.

KAJ THEILL and RAYMONDE M. THEILL,
Defendants.

COMPLAINT FOR INJUNCTION, RESTITU-
TION AND TREBLE DAMAGES

Plaintiff complains of the defendants and each of
them and for cause of action alleges:

Count I.

I.

That defendants and each of them are engaged
in actions and practices which constitute a violation
of Section 4(a) of the Emergency Price Control
Act of 1942 as amended (hereinafter called the Act).

II.

The jurisdiction of this action is conferred upon
this court by Sections 205 (a) and 205 (c) of the
Act.

III.

That at all times herein mentioned plaintiff re-
sided in a Basement Apartment, located at 2364

Vallejo Street, in the City and County of San Francisco, State of California as a tenant, in the premises of the landlord, the defendants herein.

IV.

That at all times herein mentioned there has been in full force and effect pursuant to the Act, the Rent Regulations for Housing, hereinafter called the Regulation, establishing maximum rentals for the use and occupancy of housing accommodations within the defense rental area in which the housing accommodation referred to in Paragraph III herein is located.

V.

That on or about the 4th day of January, 1946 the Officers of the San Francisco Bay Defense-Rental Area, by authority of the Act fixed the maximum rent for the housing accommodation described in Paragraph III herein at \$2.50 per day if occupied by two persons and \$2.00 per day if occupied by one person. The said maximum rent fixed as aforesaid was based upon the statement of the owner of said premises described in Paragraph III that said owners did and would thereafter among other things furnish the occupying tenant with (a) electricity, (b) towels and linens, and (c) daily maid service. That the maximum rent and services to be rendered by the landlord as aforesaid have not been modified or changed in any respect.

VI.

That plaintiff and no other person has occupied said premises described in Paragraph III herein from the first day of July, 1946, to and including the twenty-third day of July, 1948, both days included, a period of 751 days.

VII.

That the defendants have failed, neglected and refused to furnish this plaintiff with (a) electricity, (b) towels and linens, and (c) daily maid services during the entire period of tenancy by this plaintiff.

VIII.

That disregarding the maximum rent fixed as aforesaid by Officers of the San Francisco Bay Defense-Rental Area, the defendants demanded, and the plaintiff paid, rent in the sum of \$70.00 per month for the months of July, August, September, October, November and December, 1946, and January, 1947, that for the remainder of the period beginning February 1, 1947, and ending July 31, 1948, a total of 18 months, defendants demanded and plaintiff paid rent in the sum of \$67.50 per month. That payment for the month of July, 1948, was paid on the 30th day of June, 1948. That the total rent paid defendants by plaintiff the period of 760 days beginning July 1, 1946, and ending July 31, 1948, both days included, amounts to \$1,705.00. That plaintiff by reason of the failure and refusal of defendants to furnish plaintiff with electricity for the said premises has been compelled to and has paid for such electric service, a total of \$83.14. That by

reason of the failure, neglect and refusal of the defendants to furnish this plaintiff with towels and linens and daily maid service for the rental period beginning July 1, 1946, and ending July 31, 1948, both days included, plaintiff has been compelled to and has supplied himself with such services. That plaintiff has been informed and upon such information believes and therefore alleges that the furnishing of towels and linens and daily maid service is reasonably worth 65 cents per day. That the total value of said service amounts to the sum of \$494.00. Plaintiff sets forth his account showing overcharges as follows:

Total rent paid.....\$1,705.00

Electricity paid for by plaintiff 83.14

Towels and linens and daily
maid service supplied plain-
tiff by himself of the rea-
sonable value of..... 494.00

Total cost to plaintiff..\$2,282.14

Maximum rent allowable as set

forth in Paragraph V herein \$1,520.00

Total cost to plaintiff over and above the
allowable rent as set forth in Para-

graph V herein.....\$ 762.14

IX.

That by reason of the facts stated in Paragraphs V, VI, VII, and VIII herein the total cost of the

occupancy of the said premises described in Paragraph III herein for the period of 760 days beginning July 1, 1946, and ending July 31, 1948 (both days included) amounts to \$762.14.

Wherefore, plaintiff prays judgment as follows:

1. That a permanent injunction issue enjoining the defendant, her attorneys, agents and employees, and all persons in active concert or participation with her, from directly or indirectly, demanding or receiving rents for the premises described in Paragraph III herein, in excess of the maximum rents established by any regulations or order heretofore or hereafter adopted by the Emergency Price Control Act of 1942 as amended, and the Housing and Rent Act of 1947, as amended, extended or superseded.

2. Judgment for the plaintiff for three times the amount by which the rentals demanded and received by the defendant from this plaintiff for the period stated in Paragraph VIII herein exceeds the lawful amount amounting to the total sum of \$2,286.42.

3. For reasonable attorney fees as may be fixed by the court.

4. For costs of action.

WALTER S. STEVENSON,
A. L. CRAWFORD and
BRUNSWIG SHOLARS,
By /s/ WALTER S. STEVENSON,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Charles S. Whitlock, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ CHARLES S. WHITLOCK.

Subscribed and sworn to before me this 23rd day of July, 1948. .

[Seal] /s/ JACOB S. MEYER,
Court Commissioner in and for the City and County
of San Francisco, State of California.

[Endorsed]: Filed July 23, 1948.

[Title of District Court and Cause.)

MOTION TO DISMISS

Come now the defendants above named and file this their Motion to Dismiss the proceedings herein on the following grounds, to-wit:

I.

That there is a lack of jurisdiction of the subject matter in the above entitled Court.

II.

That there is a lack of jurisdiction over the persons named herein as defendants.

III.

That the above entitled Court is the improper venue for the filing of the complaint in the above entitled matter.

IV.

That the complaint does not state a claim upon which relief can be granted. The complaint does not state a claim upon which relief can be granted in that the complaint seeks an injunction to enjoin the defendants and all persons in consort or participation with them, demanding or receiving rent from the premises described in Paragraph III of the complaint, whereas under the Act of Congress known as the Price Control Extension Act of 1946, which Act is known as the Act of July 1, 1947, no such remedy is provided for a tenant; exclusive right to apply for relief is in the Housing Expediter and not in the tenant or the plaintiffs in these proceedings.

Wherefore, defendants pray that the proceedings herein be dismissed.

/s/ CHARLES A. CHRISTIN,

/s/ T. J. KEEGAN,

/s/ EARL CARROLL,

Attorneys for Defendants.

Authorities

Rental Control Act of July 1, 1947, Sec. 205 and 206 (a) and (b).

Affidavit of service by mail attached.

[Endorsed]: Filed August 27, 1948.

[Title of District Court and Cause.]

ANSWER

Come now Kaj Theill and Raymonde M. Theill, the defendants above named, and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Deny each and every, all and singular, the allegations contained in paragraph I of said complaint, and in this respect allege that at no time did they violate any of the provisions of Section 4(a) of the Emergency Price Control Act of 1942, as amended, or any section thereof.

II.

Deny each and every, all and singular, the allegations contained in paragraph II of said complaint.

III.

Admit the allegations of paragraph III of said complaint, and in this respect allege that during the entire term of the tenancy referred to in said paragraph III the said plaintiff shared said premises with one or more persons, and that at all times during said tenancy two or more persons occupied the said premises.

IV.

Deny each and every, all and singular, the allegations contained in paragraph IV of said complaint.

V.

Deny each and every, all and singular, the allegations contained in paragraph VI of said complaint, and in this respect allege that the premises described in paragraph III of said complaint, from the 1st day of July, 1946, to and including the 23rd day of July, 1948, a period of 751 days, were occupied by persons other than the plaintiff.

VI.

Deny that they have failed, neglected and refused to furnish the plaintiff with (a) electricity, (b) towels and linens, and (c) daily maid service during the entire period of tenancy by the plaintiff, and in this respect allege that they did not furnish the said services, and in this respect defendants further allege that on or about the 1st day of July, 1946, by an oral agreement, the defendants leased to the plaintiff and the plaintiff leased from the defendants the premises known as and described in paragraph III of said complaint on a month to month basis at a monthly rental of \$70.00 per month, payable monthly in advance on the first day of each and every month, and that by the terms of said agreement it was provided that no electricity, towels and/or linens, or daily maid service would be furnished, and at said time it was agreed by and between the parties that the rent as fixed by the Office of Price Administration, to wit, \$75.00 per month for two persons, would be reduced to the rental of \$70.00 per month by reason of the elimination of said services.

That from the 1st day of July, 1946, to the 31st day of January, 1947, the said plaintiff paid to the defendants as rent for said premises the sum of \$70.00 per month, and that beginning February 1, 1947, the rent was reduced to the sum of \$67.50 per month, and that ever since said 1st day of February, 1947, the plaintiff paid to the defendants, as rent for the said premises, the sum of \$67.50 per month.

VII.

Answering the allegations of paragraph VIII of said complaint, defendants admit all of the allegations contained therein commencing with line 24 on page 2, down to the words "amounts to \$1705" on line 1 of page 3; deny each and every, all and singular, the remaining allegations contained in said paragraph VIII.

VIII.

Deny each and every, all and singular, the allegations contained in paragraph IX of said complaint.

IX.

Deny that the plaintiff is entitled to an injunction, temporary or permanent.

As and for a Second, Further, Separate and Distinct Defense to Plaintiff's Complaint on File Herein, Defendants Allege:

I.

That said action is barred by the provisions of

Section 205 (e) of the Emergency Price Control Act of 1942, as amended.

As and for a Third, Further, Separate and Distinct Defense to Plaintiff's Complaint on File Herein, Defendants Allege:

I.

That all acts done by them with reference to said tenancy and with the said plaintiff were in good faith and after the taking of reasonable precautions, and not in an attempt to evade the provisions of the Emergency Price Control Act of 1942, as amended, and in this respect defendants allege that at no time did they demand or receive from the plaintiff any sum or sums in excess of the rental fixed by the Office of Price Administration for said premises under the 1942 Rent Control Act, to wit, the sum of \$2.50 per day, and defendants further allege that on or about July 8, 1946, at the time that the premises referred to in the complaint were rented to the plaintiff without the service of electricity, towels and linens and maid service, they did cause to be filed with the Office of Price Administration a report in writing indicating the decrease in service, and that since the filing thereof they have received no communication or order reducing the rental from the amount originally established by said Office of Price Administration, to wit, the sum of \$2.50 per day for two persons.

Wherefore, defendants pray that plaintiff take

nothing by his complaint on file herein, and that they have judgment for their costs incurred herein.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

State of California,
City and County of San Francisco—ss.

Raymonde M. Theill, being first duly sworn, deposes and says:

That she is one of the defendants in the above-entitled action; that she has read the foregoing Answer and knows the contents thereof; that the same is true of her own knowledge except as to matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

/s/ RAYMONDE M. THEILL.

Subscribed and sworn to before me this 8th day of November, 1948.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

Affidavit of service by mail attached.

[Endorsed]: Filed November 9, 1948.

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 25th day of January, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

MOTION TO DISMISS DENIED

This case came on regularly this day for trial before the Court sitting without a jury. Brunswig Sholars, Esq., and Walter S. Stevenson, Esq., were present on behalf of the plaintiff, and Charles Christin, Esq., was present on behalf of the defendant. Mr. Christin made a motion to dismiss. Ordered that said motion be denied. Messrs. Sholars and Christin each made an opening statement to the Court. Morley Goldberg, Charles S. Whitlock, Raymonde Theill, Martin H. Clark, and Hersch Howard were sworn and testified as plaintiff's witnesses. Mr. Sholars introduced in evidence and filed Plaintiff's Exhibits Nos. 1 and 2. Mr. Christin introduced in evidence and filed Defendant's Exhibits A, B, and C, and the plaintiff rested. Raymond Theill was recalled and gave further testimony on behalf of the defendant, and

the defendant rested. Walter S. Stevenson was sworn and testified on behalf of the plaintiff, and both sides rested. It is Ordered that this case be continued to January 28, 1949, for further trial.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing and was heard on the 25th day of January, 1949, by the Court without a jury, the plaintiff being present with his counsel, Walter S. Stevenson and Brunswig Sholars, and the defendant, Raymonde M. Theill, being present with her counsel, Charles A. Christin, testimony was taken and exhibits offered in evidence, whereupon said cause was continued for further hearing. Further hearing was held on the 28th day of January, 1949, at which time the same parties, together with their counsel as above stated, were present and further testimony was taken and exhibits offered and received in evidence. The cause was then continued for the filing of briefs. Later, on the 28th day of March, briefs having been filed by both plaintiff and defendants, the cause was submitted for decision.

Findings of Fact

The Court being fully advised in the premises finds:

That the plaintiff was a tenant of the defendants

at 2364 Vallejo Street, in the City and County of San Francisco, State of California, for the period alleged in the complaint; that the jurisdiction of this Court is confined to that period of tenancy prior to the first day of July, 1947; that the remedy of the plaintiff, if any, for the period beginning July 1, 1947, is vested in the Director of the San Francisco Bay Defense Rental Area.

That the tenancy of the plaintiff in defendants' premises began on the first day of July, 1946, and that for the twelve-month period next ensuing plaintiff paid a monthly rental of \$70.00 per month for seven months and a monthly rental of \$67.50 per month for five months. That the total rent paid defendants for the twelve months next ensuing after the said first day of July, 1946, was the sum of \$827.50. That prior to the tenancy of the plaintiff, on the 4th day of January, 1946, the Director of the San Francisco Bay Defense Rental Area had by law fixed the maximum rent for the occupancy of said premises at \$2.50 per day when occupied by two persons and \$2.00 per day when occupied by one person. That the plaintiff was the sole and only occupant of said premises. That by reason of the premises the defendants for said twelve-month period demanded and the plaintiff paid to them as rental the sum of \$97.50 in excess of the maximum rent allowed for said premises as fixed by said Rent Director.

That the defendants were bound by the Registration Certificate on file in the office of the San

Francisco Bay Defense Rental Area to furnish plaintiff with electricity, daily maid service, and linens. That during the period of tenancy of plaintiff the maximum rent as fixed by said Director of the San Francisco Bay Defense Rental Area was not altered, amended, or changed and remained in full force and effect during said twelve-month period.

That the maximum rent for said twelve-month period at \$2.00 per day (the occupancy being by one person only) amounts to \$730.00. That it cost the plaintiff the following sums to supply himself with the several items required to be furnished by the defendants under the provisions of the Registration of said premises with the office of the Director of the San Francisco Bay Defense Rental Area:

| | |
|------------------------------|---------|
| Wear and tear on linens..... | \$ 9.00 |
| Laundrying of linens..... | 60.00 |
| Electricity | 42.00 |
| Maid Service | 96.00 |

A Total of.....\$207.00

That the plaintiff is entitled to recover costs and attorney fees in the sum of \$125.00.

Conclusions of Law

As conclusion of law from the foregoing facts, the Court finds that the plaintiff is entitled to a judgment against the defendants, and each of them,

in the sum of \$304.50 and \$125.00 for attorney fees and costs to date.

Let judgment be entered accordingly.

Dated this 13th day of April, 1949.

/s/ MICHAEL J. ROCHE,

United States District Judge.

Receipt of Copy attached.

[Endorsed]: Filed April 13, 1949.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28,206-R

CHARLES S. WHITLOCK,

Plaintiff,

vs.

KAJ THEILL and RAYMONDE M. THEILL,
Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, on the 25th day of January, 1949, and for further hearing on the 28th day of January, 1949, Walter S. Stevenson and Brunswig Sholars appeared as attorneys for the plaintiff, and Charles A. Christin appeared as attor-

ney for the defendants, and the Court having heard the testimony and having examined the proof offered by the respective parties, and Court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now therefore, by reason of the law and findings aforesaid:

It Is Hereby Ordered, Adjudged and Decreed, that plaintiff, Charles S. Whitlock, do have and recover of defendants, Kaj Theill and Raymonde M. Theill, the sum of \$304.50, together with plaintiff's costs and attorney fees in the sum of \$125.00.

Judgment rendered this 13th day of April, 1949.

/s/ MICHAEL J. ROCHE,
U. S. District Judge.

Receipt of copy attached.

Entered in Civil Docket April 14, 1949.

[Endorsed]: Filed April 23, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

To the Circuit Court of Appeals:

Notice Is Hereby Given that Kaj Theill and Raymonde Theill, defendants in the above proceedings, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment made

and entered on the 14th day of April, 1949, and a motion for a new trial denied by the District Court on the 9th day of May, 1949.

Dated: June 1, 1949.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

[Endorsed]: Filed June 1, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing documents and exhibits, listed below, are the originals filed in this Court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorney for the Appellants, to wit:

Complaint for Injunction, Restitution and Treble Damages.

Motion to Dismiss.

Notice of Overruling of Motion to Dismiss Answer.

Demand for Jury Trial.

Order for Entry of Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Affidavit of Charles A. Christin in Support of Motion for New Trial and Motion to Vacate Judgment.

Motion for a New Trial and Motion to Vacate Judgment.

Notice of Appeal to Circuit Court of Appeals.

Designation of Contents of Record on Appeal.

Request for Dismissal of Appeal.

Minute Order of January 25, 1949, Denying Motion to Dismiss.

Minute Order of May 9, 1949, Denying Motion for a New Trial.

Plaintiff's Exhibits Nos. 1 and 2 (copy of Report of Change in Identity of Landlord).

Defendants' Exhibits Nos. A, B and C.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of July, A.D. 1949.

C. W. CALBREATH,

Clerk,

By /s/ M. E. VAN BUREN,

Deputy Clerk.

[Endorsed]: No. 12,288. United States Court of Appeals for the Ninth Circuit. Kaj Theill and Raymonde M. Theill, Appellants, vs. Charles W. Whitlock, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 13, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12,288

CHARLES S. WHITLOCK,
Plaintiff and Respondent,

vs.

KAJ THEILL and RAYMONDE THEILL,
Defendants and Appellants.

AMENDED DESIGNATION OF PORTIONS
OF RECORD ON APPEAL AND STATE-
MENT OF POINTS

The defendants and appellants Kaj Theill and Raymonde Theill hereby designate the following as the record on appeal:

1. Complaint for Injunction, Restitution and Treble Damages.
2. Motion to Dismiss.
3. Order Denying Motion to Dismiss.
4. Answer of Defendants Kaj Theill and Raymonde Theill.
5. Findings of Fact and Conclusions of Law.
6. Judgment.
7. Notice of Appeal.
8. Clerk's Certificate.

Statement of Points

The following are the statement of points to be relied upon on appeal:

The legal question presented from the pleading is:

Can a tenant recover money damages from a landlord for alleged diminution of services prior to the time that the Office of Housing Expediter shall have made an order fixing the rent of the premises without services which have been eliminated and can a tenant under the provisions of the Rent Control Act of 1947, as amended, maintain an action for an injunction against a landlord, or is the tenant's only relief under the provisions of the Act for treble damages being three times the amount

of the excessive rent found to have been paid by the tenant to the landlord?

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed December 21, 1949.

No. 12,288

IN THE

United States Court of Appeals
For the Ninth Circuit

KAJ THEILL and RAYMONDE M. THEILL,
Appellants,

VS.

CHARLES W. WHITLOCK,
Appellee.

APPELLANTS' OPENING BRIEF.

CHARLES A. CHRISTIN,
CHRISTIN, KEEGAN & CARROLL,
550 Russ Building, San Francisco 4, California,
Attorneys for Appellants.

FILED

MAY 10 1950

PAUL P. O'BRIEN,
CLERK

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No. 12,288

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KAJ THEILL and RAYMONDE M. THEILL,

Appellants,

vs.

CHARLES W. WHITLOCK,

Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal from an order denying a dismissal of the proceedings and from the judgment.

I.

**THE TRIAL COURT ERRED IN DENYING DEFENDANTS'
MOTION TO DISMISS. (TRANSCRIPT p. 14.)**

The complaint in Paragraphs I and II of the First Count alleges that the jurisdiction of the United States District Court is conferred by Section 205(a) and 205(c) of the Emergency Price Control Act of 1942, as amended, and that the cause of action is predicated on a violation of Section 4(a) of said Act.

Were it not for the Rent Control Act of 1942 as amended, the United States District Court would not have jurisdiction in an action involving an amount less than \$3,000.00. The District Court does not have jurisdiction for actions predicated on a breach of a lease contract where compensatory damages in an amount less than \$3,000 are sought.

Pursuant to Section 205(e) of the 1942 Act, the tenant who has been overcharged may sue the landlord for treble the amount of the overcharge predicated on a violation of the provisions of the Rent Control Act.

A rent overcharge has been defined to be the difference between the rent fixed by the Housing Expediter in the area, and the amount which the landlord has taken in excess of the amount fixed in the registration.

A reading of the complaint shows that the relief sought by the plaintiff is not predicated on a violation of the Act, to-wit, the difference between the registered rent and the amount actually collected by the defendants but the cause of action is predicated on damages for an alleged breach of contract, in that it is alleged that the plaintiff did not receive the services which the landlord had agreed to supply.

Paragraph VII of the complaint (Transcript, p. 4) alleges that the defendants have failed, neglected and refused to furnish the plaintiff with (a) electricity; (b) towels and linen and (c) daily maid service during the entire period of the tenancy by the plaintiff.

The alleged damages are set forth in Paragraph VIII (Transcript, p. 4). The damages are specifically alleged as being the difference between the total rent actually paid—\$1705.00; and electricity paid by the plaintiff—\$83.14; the reasonable value of towels and linens, and daily maid service not supplied by the defendants—\$494.00 making a total of \$2282.14.

It is then alleged that the maximum rent was \$1520.00 and that the difference between the total rent paid and the alleged damages for breach of contract is a balance of \$762.14.

By some inexplicable reasoning the Court granted damages in the sum of \$304.50 and attorneys fees in the sum of \$125.00. In the findings (Transcript, p. 17), the Court granted damages as follows: wear and tear of linens—\$9.00; laundry of linens—\$60.00; electricity—\$42.00; maid service—\$96.00 or a total of \$207.00.

It is clear that the damages allowed were for an alleged breach of the lease and are not predicated on the statutory remedies as set forth in the Act, to-wit, the difference between the rent charged and the ceiling rent.

A motion to dismiss was interposed by defendants, and denied.

It is the contention of the defendants that the United States District Court had no jurisdiction in an action for damages when an amount less than \$3,000.00 is sought and, secondarily, there is no diversity of citizenship.

II.

THIS APPEAL IS ALSO TAKEN FROM THE JUDGMENT (TRANSCRIPT p. 7) ON THE GROUND THAT THE COURT ERRED IN ENTERING JUDGMENT PREMATURELY.

It is conceded that the maximum rent for the premises was \$2.50 per day if occupied by two persons and \$2.00 per day if occupied by one person. These rentals include all of the services which the complaint alleges were not furnished by the defendants during the period covered in the complaint.

It is appellants' contention that until an order had been made by the Office of the Housing Expediter reducing the rental with the eliminated services that the Court could not render judgment until the amount so fixed with the reduced services had been established, in order to determine the difference between the ceiling rental as adjusted without the eliminated services and the rent actually collected by the appellants.

In support of this contention we cite *Bowles v. Nasif*, 58 Fed. Supp. 644, at page 645:

“There is nothing of a positive nature in the record to show that the local Board has finally decided the question of what is the proper rent to be charged for this apartment, except that the local head of that body testified from certain entries on the application or registration sheet that it was his opinion that the demand for increase above \$25 a month had been denied. It seems clear that \$55 per month is excessive, but I think it was the duty of the Board to consider all the evidence and elements entering into a fair rental value of this apartment at the basic period, and that until this

is done neither the landlord nor the tenant can tell what amount should apply. Each apparently was laboring under the belief that the matter was still being considered by the Board, and for which reason the tenant was paying only what he claimed he was advised to pay by that authority, to-wit, \$33 per month.

This statute, 50 U.S.C.A. Appendix, Section 901 et seq., is highly penal in its nature, and before either the tenant or the Government is permitted to recover the treble damages, which it allows, I think it should be established beyond question and the Board should fix a fair rental for the property. I do not believe this has been done and until it is the suit is premature."

In *Schindler v. Zuberbuehler*, 76 Fed. Supp. 85, at page 86, the Court said:

"Without going into the question of whether the one year statute of limitations bars most of the relief sought, which defendants urge, I feel that plaintiff's action must be dismissed for two reasons. First, the payment of \$55.00 per month from March 1945, to December, 1946, was not in excess of the maximum legal rent, because the OPA order did not reduce the rent below that amount retroactively; i.e., only after August 20, 1947, was the maximum legal rent for the premises \$47.50. Second, the fact that plaintiff was not actually receiving the services to which he was entitled was a ground for reduction of rent, upon application to the OPA, but not for an independent suit for overpayment. Therefore, the motion to dismiss the complaint will be granted."

It is apparent that the judgment in this action was rendered prematurely in that the Court could not enter any judgment until the basis for the determination of damages had been established, to-wit, the rental for the premises which eliminated services as compared with the rent actually charged.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco, California,

May 15, 1950.

Respectfully submitted,

CHARLES A. CHRISTIN,

CHRISTIN, KEEGAN & CARROLL,

Attorneys for Appellants.

No. 12,288

IN THE
United States Court of Appeals
For the Ninth Circuit

| | |
|------------------------------------|--------------------|
| KAJ THEILL and RAYMONDE M. THEILL, | } |
| vs. | |
| CHARLES S. WHITLOCK, | |
| | |
| | <i>Appellants,</i> |
| | <i>Appellee.</i> |

APPELLEE'S REPLY BRIEF.

ALLISON E. SCHOFIELD,
RAYMOND L. HANSON,
BRUNSWIG SHOLARS,
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1109 De Young Building, San Francisco 4, California,
THOMAS M. JENKINS,
1704 Central Tower, San Francisco 3, California,
Of Counsel.

FILED

JUN 14 1950

PAUL P. O'BRIEN,

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IN THE
United States Court of Appeals
For the Ninth Circuit

KAJ THEILL and RAYMONDE M. THEILL,
Appellants,

vs.

CHARLES S. WHITLOCK,

Appellee.

APPELLEE'S REPLY BRIEF.

I.

The appellee does not subscribe to the third paragraph of page 2 of appellants' brief. The definition of the word "overcharge" is not comprehensive.

It is appellee's contention that the findings of fact, made up of five items as follows:

"1. The difference between \$827.50 rent actually paid and \$730.00 (365 days at \$2.00 per day) the allowable rent fixed as alleged in paragraph 5 of the complaint (Transcript of Record page 3) constitutes one item of overcharge in the sum of \$97.50. The four items amounting to \$207.00 is the cost to appellee of

furnishing himself with these items required to be furnished him by appellants, pursuant to appellants' registration certificate," are adequate. (\$207.00 + 97.50 = \$304.50.)

II.

The appellants' brief, page 3, makes the statement:

"By some *inexplicable reasoning* the Court granted damages in the sum of \$304.50 and attorneys' fees in the sum of \$125.00." (Emphasis added.)

The "findings" explain the matter fully in these words: "The jurisdiction of this Court is confined to that period of tenancy prior to the first day of July, 1947," that the remedy of the plaintiff, if any, for the period beginning July 1, 1947, is vested in the Director of the San Francisco Bay Defense Rental Area. (Transcript page 16.)

The trial Court found further that the plaintiff was a tenant of the defendants etc. for the period alleged in the complaint. (Transcript pages 15-16.) (Complaint paragraph VI, Transcript page 4.)

III.

The plaintiff, at the trial, contended that the Court had jurisdiction to grant relief for the *entire* period of tenancy. This the Court denied under the provisions of the Regulations of the Housing Expediter Section 825.5b which authorizes the Director of the San Francisco Bay Defense Rental Area to adjust rents from and after July, 1947.

IV.

It is therefore apparent that recovery for the overcharge for the period July 1, 1946 to June 30, 1947, must be by suit in the United States District Court. The mere fact that the Regulations of the Housing Expediter Section 825.5b prevented the Director of the San Francisco Bay Defense Rental Area from fixing rents prior to July 1, 1947, did not attempt to prevent the District Court from doing so.

It is also apparent that if the Section 825.5b supra authorized the Director to fix the rent for the period beginning July 1, 1946, the trial Court could have dismissed the complaint in its entirety or granted leave to amend, after the Director had fixed the rent for the entire period of tenancy herein.

Confronted with this dilemma the trial Court wisely sought to grant relief, knowing that unless such relief was granted the appellants would be permitted to profit by their flagrant flaunting of the law.

V.

Bowles v. Nasif, 58 Fed. Supp. 644 at page 645, cited by appellants (Appellants' Brief page 4) has no application to the certain case for the simple reason that the rent Director was then vested with authority to fix the rent for the entire period covered by the alleged overcharge.

The same is true of *Schindler v. Zuberbuchler*, 76 Fed. Supp. 85, at page 86. (Appellants' Brief page 5.)

VI.

Appellee predicates his contention that the trial Court was acting within the law in proceeding to trial and rendering a judgment as it did in *Adler v. Northern Hotel Co.*, 175 Fed. (2d) 619, at page 620.

“The identical words ‘competent jurisdiction’ were used in the Emergency Price Control Act, *supra*, and that phrase in that statute has not been construed as a restriction upon Federal jurisdiction. On the contrary, federal courts have tried the damage claims *without regard to the amount involved*. This the defendants concede, but they say that federal courts are competent to try such actions, not by S. 205 (e) of that Act which provides that such action may be brought ‘in any court of competent jurisdiction’ but by virtue of S. 205 (c) which provided that ‘The district courts shall have jurisdiction * * * concurrently with State and Territorial courts, of all other proceedings * * *’ But S. 205 (c) has to be read with S. 205 (e) and when so read, as to jurisdiction, they produce language in effect identical with Section 205 of the Housing and Rent Act.” (Emphasis added.)

“When the purposes of Congress are considered and the well known principles of the rules already mentioned are applied, there can be no doubt that the Housing and Rent Act, *supra*, does contain a grant of general jurisdiction to the Federal courts. See *Adams v. Backlund*, D.C., 81 F. Supp. 643. To hold otherwise we would have to ignore Section 205, especially the phrase such amount. This we may not do. *Market Co. v. Hoff-*

man, supra, and the Ex Parte Public Nat. Bank,
supra.”

Dated, San Francisco, California,
June 12, 1950

Respectfully submitted,

ALLISON E. SCHOFIELD,

RAYMOND L. HANSON,

BRUNSWIG SHOLARS,

SCHOFIELD, HANSON & SHOLARS,

Attorneys for Appellee.

WALTER S. STEVENSON,

THOMAS M. JENKINS,

Of Counsel.



Nos. 12289-12290-12291

United States
Court of Appeals
For the Ninth Circuit.

ESTATE OF ELLA K. McCLATCHY, ELEANOR
McCLATCHY and CHARLOTTE MALONEY,
Executrices,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Upon Petitions to Review Decisions of the Tax Court
of the United States.

FILED

OCT 28 1949

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

PAUL P. O'BRIEN,
CLERK

Nos. 12289-12290-12291

United States
Court of Appeals
For the Ninth Circuit.

ESTATE OF ELLA K. McCLATCHY, ELEANOR
McCLATCHY and CHARLOTTE MALONEY,
Executrices,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Upon Petitions to Review Decisions of the Tax Court
of the United States.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Petitioner:

JOHN W. BURROWS, C.P.A.

JOHN J. HAMLYN

For Respondent:

A. J. HURLEY

R. C. WHITLEY

The Tax Court of the United States

Docket No. 13214

ELEANOR McCLATCHY and CHARLOTTE MALONEY, EXECUTRICES of the ESTATE OF ELLA K. McCLATCHY,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated December 11, 1946; and, as a basis for this proceeding, allege as follows:

(1) The petitioners are the executrices of the Estate of Ella K. McClatchy, with headquarters at 911 Seventh Street, Sacramento, California. The returns for the period here involved were filed with the Collector of Internal Revenue for the First District of California, at San Francisco.

(2) The notice of deficiency (a copy of which is attached hereto and marked "Exhibit A") was mailed to the petitioners on December 11, 1946.

(3) The taxes in controversy are income taxes for the calendar years 1942 and 1943, in the amounts of \$9,693.73 and \$4,761.37 respectively. (See Exhibits B and C attached hereto).

(4) The determination of taxes set forth in the said notice of deficiency is based upon the following errors:

(A) The Commissioner, in his deficiency notice, fails to credit the taxpayer with the full amount of tax already assessed and paid.

(B) In both years, 1942 and 1943, the Commissioner proposes to levy tax upon an amount of \$1,300.00 representing "dividends" received from the James McClatchy Company. The Estate of Ella K. McClatchy never received any such sums from the James McClatchy Company, either as "dividends" or in any other form.

(C) In 1942 the Estate of Ella K. McClatchy was called upon to pay to the State of California a sum of \$9,374.18 representing additional income taxes assessed against the decedent Ella K. McClatchy for the years 1935 and 1936, together with interest thereon. The payment was claimed as a deduction in the 1942 return of the Estate. The Commissioner proposes to disallow such deduction.

(D) In 1943 the State of California levied against the heirs of Ella K. McClatchy—i.e., against the Estate of Ella K. McClatchy—additional inheritance taxes to the amount of \$2,223.41. The petitioners claim that this interest payment is a proper deduction from the income of the Estate; the Commissioner refuses to so recognize it.

(5) The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(A)—(1) The original return of the Estate of Ella K. McClatchy for the year 1942 showed a tax

liability of \$59,289.89, which was duly paid in 1943.

(A)—(2) In January 1947 the Estate of Ella K. McClatchy received a demand from the Collector at San Francisco for 1942 income tax due and payable in the amount of \$1,669.93. This demand—(plus interest of \$362.05)—was paid in February, 1947.

(A) —(3) The original return of the Estate of Ella K. McClatchy for the year 1943 showed a tax liability of \$60,396.92, which was duly paid in 1944.

(A)—(4) In January 1947 the Estate of Ella K. McClatchy received a demand from the Collector at San Francisco for 1943 income tax due and payable in the amount of \$1,064.50. This demand—(plus interest of \$166.92)—was paid in February, 1947.

(B)—(1) James McClatchy, the founder of what is now the McClatchy Newspapers corporate enterprise, died some sixty-odd years ago, leaving behind him a widow, Charlotte; two sons approaching manhood, Charles and Valentine; two minor daughters, Frances (Fanny) and Emily; and a majority interest in a newspaper plant in Sacramento, California. His estate (consisting almost entirely of his interest in the "Sacramento Bee") was devised to his widow.

Mrs. Charlotte McClatchy carried on the business of publishing the Sacramento Bee for a few years following James McClatchy's death. Then, when the two sons attained majority and developed responsibility, she turned the Bee over to them as

joint proprietors. The consideration for the transfer was a verbal agreement on the part of the two young men that they would support their mother and their two sisters for as long as they each should live.

The two McClatchy sons took over the "Sacramento Bee" and prospered. Along about 1898 they decided to build a new plant; and, in order to handle the enlarged venture, pooled all of their resources and formed a corporation named the James McClatchy Company. This last-named corporation took title to the physical properties of the "Sacramento Bee," and assumed certain capital obligations of the two McClatchy brothers—among which assumed obligations there was included the agreement covering the support of Mrs. Charlotte McClatchy and her two daughters for the terms of their natural lives.

(Mrs. Charlotte McClatchy died in 1913. Emily McClatchy died in 1946. Fanny McClatchy (Richardson) is still alive at this writing.)

(B)—(2) In 1923 the two McClatchy brothers severed their business relations. Charles—(universally known as "C.K.")—retained the newspaper and acquired complete ownership of the James McClatchy Company. The obligation for support of the two McClatchy sisters became, therefore, an obligation of the "C.K." organization—(which later developed into the present McClatchy Newspapers corporation).

(B)—(3) The sums paid, year by year, to the two McClatchy sisters were never considered, or

claimed, as deductions from the taxable incomes of either the two McClatchy brothers—or from the taxable income of the James McClatchy Company.

(B)—(4) In 1935 the Commissioner of Internal Revenue, in his determination of the income tax liability of Charles K. McClatchy for the year 1932, evolved the unique theory that the payments by the James McClatchy Company to the two McClatchy sisters were equivalent to a dividend distribution to Charles K. McClatchy—(followed by a gift from him to his two sisters). This theory was not acceptable and the question was referred to the Board of Tax Appeals. The Board referred the case back to the Technical Staff; and in 1936 an agreement was effected with the Technical Staff—and approved by the Board of Tax Appeals—whereby \$5,200.00 of the amounts paid to the two McClatchy sisters was to be considered as taxable to Charles K. McClatchy. Since 1932, Charles K. McClatchy and his descendants have paid income taxes to the federal government each year on an amount of \$5,200.00 “dividend” income.

(B)—(5) In 1942 and 1943 the Estate of Ella K. McClatchy held one-fourth of the common capital stock of McClatchy Newspapers—the parent stockholder of, and the eventual successor to the James McClatchy Company. Upon this basis the Commissioner proposes to add to the taxable income of the said Estate of Ella K. McClatchy in each of the years 1942 and 1943 the sum of \$1,300.00, representing one-fourth of the \$5,200.00 “dividend” described in the preceding paragraphs.

(C)—(1) The California Personal Income Tax Act of 1935 contained a provision (Section 34 of the Act) which had the effect of placing a “personal-service” corporation in the same category as a partnership for purposes of taxation. This section of the law provoked a great deal of controversy and some considerable action in the courts. The constitutionality of the section was attacked—and a test case (*McCreery v. McClogan*, 17c. (2d) 555) was carried to the State Supreme Court for decision.

(C)—(2) In 1939 the State Tax Commissioner, acting under the provisions of Section 34 of the Personal Income Tax Act, asserted against Ella K. McClatchy additional income taxes for the years 1935 and 1936 totalling \$7,110.22. This asserted tax was protested; and was held in abeyance pending the opinion of the State Supreme Court.

(C)—(3) Ella K. McClatchy died in September 1939. On March 7, 1941 the State Supreme Court ruled against *McCreery* and held Section 34 of the Personal Income Tax Act to be constitutional. The State Tax Commissioner re-asserted the additional tax of \$7,110.22 in March 1942—and the said tax, together with \$2,264.59 interest, was paid out of the funds of the Estate of Ella K. McClatchy.

(C)—(4) The petitioners, in the return of the Estate for 1942, claimed deductions of \$7,110.22 and \$2,264.59. The respondent Commissioner proposes to disallow the \$7,110.22 tax deduction in full—and \$1,150.67 of the \$2,264.59 interest deduction.

(C)—(5) The report of the examining revenue agent in this case issued September 19, 1945. The recommendations of the examiner are repeated, without change, in the deficiency notice of December 11, 1946. In the examiner's report it is stated:

“These taxes”—(viz., the \$7,110.22 state taxes for 1935 and 1936)—“accrued on September 29, 1939, the date of death of the decedent. The deduction was allowable in the return of the decedent
* * * ,”

(C)—(6) Accordingly, on October 9, 1945, appropriate claim for refund of taxes erroneously paid by the decedent Ella K. McClatchy for 1939 was filed with the Collector at San Francisco. This claim was denied by the respondent Commissioner January 6, 1947.

(D)—(1) In December, 1943, the State of California demanded additional inheritance taxes from the heirs of Ella K. McClatchy, together with interest on the said additional taxes amounting to \$2,-223.41. This interest (as well as the additional tax) was paid out of the funds of the Estate of Ella K. McClatchy in December 1943, but was, by reason of a bookkeeping error, overlooked and omitted in the preparation of the 1943 return of the Estate.

Wherefore, the petitioners pray that this Court may hear this proceeding and determine the amount of the liability of the Estate of Ella K. McClatchy

for income taxes for the two calendar years 1942 and 1943.

/s/ JOHN W. BURROWS,
C.P.A. Counsel for Petition-
ers, 1095 Market St., San
Francisco, California.

Of Counsel:

/s/ JOHN J. HAMLYN,
911 Seventh Street, Sacra-
mento, California.

EXHIBIT A

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco 5, California

Office of
Internal Revenue Agent in Charge
San Francisco Division
IRA:90-D-DuF
(C;TS;PD SF:EDR)

Dec. 11 1946

Estate of Ella K. McClatchy, Deceased
Eleanor McClatchy and
Charlotte Maloney, Executrices
911 Seventh Street
Sacramento, California

Dear Mesdames:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1942 discloses a deficiency of \$8,639.98 and that the determination of your income and vic-

tory tax for the taxable year ended December 31, 1943 discloses a deficiency of \$1,731.25 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

Commissioner.

By /s/ F. M. HARLESS,

Internal Revenue Agent
in Charge.

STATEMENT

San Francisco

IRA : 90-D-DuF

(C:TS:PD

SF: EDR)

Estate of Ella K. McClatchy, Deceased

Eleanor McClatchy and

Charlotte Maloney, Executrices

911 Seventh Street

Sacramento, California

Tax Liability for the Taxable Years Ended December 31, 1942 and December 31, 1943

| Year | Deficiency |
|----------------------------------|------------|
| 1942 Income tax..... | \$8,639.98 |
| 1943 Income and victory tax..... | 1,731.25 |

In making this determination of your tax liability, careful consideration has been given to your protest of October 2, 1945; to the statements made at the conferences held on October 29, 1945, May 10, 1946 and June 13, 1946.

A copy of this letter and statement has been mailed to your representative, Mr. John W. Burrows, Central Tower, 703 Market Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income
Year: 1942

| | |
|--|--------------|
| Net income as disclosed by return..... | \$93,051.67 |
| Unallowable deductions and additional income: | |
| (a) Dividends | \$1,152.87 |
| (b) Interest income | 192.07 |
| (c) Interest expense | 1,224.86 |
| (d) Taxes | 7,110.22 |
| (e) Other deductions | 1,097.45 |
| | 10,777.47 |
| Net income as adjusted..... | \$103,829.14 |

Explanation of Adjustments

| Corporations | Reported | Paid | Increase or (decrease) |
|--------------------------------|----------|-------------|---------------------------|
| 100 Briggs Mfg. Co..... | \$150.00 | \$ 200.00 | \$ 50.00 |
| 100 Simmons Co..... | 173.64 | 124.01 | (49.63) |
| 30 American Tel. & Tel..... | 337.50 | 270.00 | (67.50) |
| 210 Transamerica Corporation.. | 80.00 | Non-taxable | (80.00) |
| James McClatchy Co..... | 0.00 | 1,300.00 | 1,300.00 |
| | | | \$1,152.87 |
| Net increase | | | \$1,152.87 |

(b) The interest received on refund of Federal income tax in the amount of \$192.07 on November 6, 1942, and reported on the 1943 return, is properly taxable in the year received. The net income is, therefore, increased by \$192.07.

(c) It is held that payments in 1942 for interest accrued to date of death upon deficiencies in state income taxes for the years 1935 and 1936 in the amounts of \$371.40 and \$779.27, respectively, and upon Federal income tax for the year 1938 in the amount of \$59.29, of decedent, Ella K. McClatchy (deceased September 23, 1939) are not a proper deduction from income in 1942. The amount of \$14.90 is not a liability of the estate.

The computation of the adjustment to interest paid is as follows:

| Interest Payments | Claimed | Allowed | Disallowed |
|---------------------------|-----------|----------|------------|
| Franchise Tax 1935..... | \$ 652.93 | \$281.53 | \$ 371.40 |
| Franchise Tax 1936..... | 1,611.66 | 832.39 | 779.27 |
| Fed. Income Tax 1938..... | 306.45 | 247.16 | 59.29 |
| Fed. Income Tax..... | 14.90 | 0.00 | 14.90 |
| Total adjustment | | | \$1,224.86 |

(d) It is held that the state income taxes paid in 1942 upon income of decedent, Ella K. McClatchy (deceased September 23, 1939) for the years 1935 and 1936 in the amounts of \$1,797.05 and \$5,313.17, respectively, are not a proper deduction from income in 1942. Income is, therefore, increased by \$7,110.22 (\$1,797.05 plus \$5,313.17).

Explanation of Adjustments
(Continued)

(e) Fees paid for accounting service in connection with final settlement of Federal Estate taxes, expenses covering preparation of data and conferences with attorneys are properly chargeable against the corpus of the estate. The income is increased by the disallowance of the following deductions:

| | |
|---|-------------------|
| Fees in settlement of Federal Estate Taxes..... | \$ 980.00 |
| Accounting service | 112.50 |
| Expenses | 4.95 |
| Total adjustment | <u>\$1,097.45</u> |

Computation of Alternative Tax
Year: 1942

| | |
|-----------------------------------|---------------------|
| Net income | \$103,829.14 |
| Net long-term capital gain..... | 114.01 |
| Ordinary net income..... | <u>\$103,715.13</u> |
| Less: Personal exemption..... | 500.00 |
| Surtax net income..... | <u>\$103,215.13</u> |
| Income subject to normal tax..... | <u>\$103,215.13</u> |

| | |
|---|---------------------|
| Normal tax at 6% on 103,215.13..... | \$ 6,192.91 |
| Surtax on \$103,215.13..... | 61,679.95 |
| Partial tax | <u>\$ 67,872.86</u> |
| Add: 50% of net long-term capital gain..... | 57.01 |
| Alternative tax | <u>\$ 67,929.87</u> |

Computation of Tax
Year: 1942

| | |
|---------------------------------------|---------------------|
| Net income | \$103,829.14 |
| Less: Personal exemption..... | 500.00 |
| Balance (Surtax net income)..... | <u>\$103,329.14</u> |
| Net income subject to normal tax..... | <u>\$103,329.14</u> |
| Normal tax at 6% on \$103,329.14..... | \$ 6,199.75 |
| Surtax on \$103,329.14..... | 61,770.02 |
| Total tax | <u>\$ 67,969.77</u> |
| Alternative tax | <u>\$ 67,929.87</u> |
| Correct income tax liability..... | <u>\$ 67,929.87</u> |

Income tax assessed:

Original, Account No. 67502

First California District..... 59,289.89

Deficiency of income tax.....\$ 8,639.98

Adjustments to Net Income
Year: 1943

| | Income Tax Net Income | | Victory Tax Net Income | |
|--|--------------------------|----------|---------------------------|----------|
| Net income as disclosed by return.... | \$88,484.43 | | \$114,414.65 | |
| Unallowable deductions and additional income: | | | | |
| (a) Dividends | \$1,369.37 | | \$1,369.37 | |
| (b) Interest expense.... | 7.22 | | | |
| (c) Taxes | 814.82 | | | |
| (d) Other deductions.... | 60.50 | 2,251.91 | 60.50 | 1,429.87 |
| Total | \$90,736.34 | | \$115,844.52 | |
| Non-taxable income and additional deductions: | | | | |
| (e) Interest income | | 192.07 | | 192.07 |
| Net income as adjusted..... | \$90,544.27 | | \$115,652.45 | |

EXPLANATION OF ADJUSTMENTS

(a) Income from dividends is increased by \$1,369.37 to adjust for the following corrections in dividends received:

| Corporation | Reported | Paid | Increase or (decrease) |
|------------------------------------|----------|-------------|---------------------------|
| 200 Natomas Co. | \$ 0.00 | \$ 50.00 | \$ 50.00 |
| 100 Simmons Co. | 0.00 | 99.37 | 99.37 |
| 210 Transamerica Corporation | 80.00 | Non-taxable | (80.00) |
| James McClatchy Co..... | 0.00 | 1,300.00 | 1,300.00 |
| Net increase | | | \$1,369.37 |

(b) It is held that payment in 1943 for interest accrued to date of death in the amount of \$7.22 upon a deficiency in state income tax for the year 1938 of decedent, Ella K. McClatchy (deceased September 23, 1939) is not a proper deduction from income for 1943. Income is, therefore, increased by \$7.22.

In your protest, you claim a deduction of interest in the amount of \$2,223.41 for the year 1943 for interest paid upon a deficiency on State inheritance tax. The deduction was not claimed in your return.

It is held that the interest is not a proper deduction from the estate's income in 1943.

(c) It is held that the state income taxes paid in 1943 upon income of the decedent, Ella K. McClatchy (deceased September 23, 1939) for the years 1938 and 1939 in the amounts of \$271.42 and \$543.40, respectively, are not proper deduction from income for 1943. Income is, therefore, increased by \$814.82 (\$271.42 plus \$543.40).

(d) Deduction of \$60.50 for appraisal fee is disallowed as representing an expense properly chargeable against the corpus of the estate.

(e) Interest income of \$192.07 on refund of Federal income tax received November 5, 1942 is eliminated from 1943 income.

Computation of Tax
Year: 1943

| | |
|---|--------------|
| Income tax net income..... | \$90,544.27 |
| Less: Personal exemption..... | 500.00 |
| Surtax net income..... | \$90,044.27 |
| Balance subject to normal tax..... | \$90,044.27 |
| Normal tax at 6% on \$90,044.27..... | \$ 5,402.66 |
| Surtax on \$90,044.27..... | 51,474.09 |
| Total income tax..... | \$56,876.75 |
| Victory tax net income..... | \$115,652.45 |
| Less: Specific exemption..... | 624.00 |
| Income subject to victory tax..... | \$115,028.45 |
| Victory tax before credit (5% of \$115,028.45) | \$ 5,751.42 |
| Less: Victory tax credit..... | 500.00 |
| Net victory tax..... | 5,251.42 |
| Correct income and victory tax liability..... | \$62,128.17 |

Income and victory tax disclosed by return:

(Original, Account No. 185587

First California District)..... \$60,396.92

Deficiency of income and victory tax..... \$ 1,731.25

EXHIBIT B

Petition of Estate of Ella K. McClatchy

Taxes in Controversy, 1942

Taxes Asserted by Commissioner

Tax assessed and paid, per original return..... \$59,289.89

Tax assessed January 24, 1947 and paid

February 1947 1,669.93

Tax deficiency asserted in present notice

(Exhibit A) 8,639.98

Total \$69,599.80

Tax Liability Admitted by Petitioner

Income originally returned.....\$93,051.67

Corrections (refer to deficiency letter):

Item (b) 192.07

Item (e) 1,097.45

\$94,341.19

Less item (a)..... 147.13

\$94,194.06

Exemption 500.00

Taxable income\$93,694.06

Normal tax \$ 5,621.64

Surtax 54,284.43

Total tax admitted..... \$59,906.07

In controversy \$ 9,693.73

EXHIBIT C

Petition of Estate of Ella K. McClatchy

Taxes in Controversy, 1943

Taxes Asserted by Commissioner

Tax assessed and paid per original return..... \$60,396.92

Tax assessed January 24, 1947 and paid

February 1947 1,064.50

Tax deficiency asserted in present notice

(Exhibit A) 1,731.25

Total \$63,192.67

Tax Liability Admitted by Petitioner

| | | |
|--|-------------|-------------|
| Income originally returned..... | \$88,484.43 | |
| Corrections (refer to deficiency letter) : | | |
| Item (a) | 69.37 | |
| Item (d) | 60.50 | |
| | | <hr/> |
| | \$88,614.30 | |
| Less item (b)..... | \$2,223.41 | |
| item (e)..... | 192.07 | 2,415.48 |
| | | <hr/> |
| | \$86,198.82 | |
| Exemption | 500.00 | |
| | | <hr/> |
| Taxable income | \$85,698.82 | |
| | | <hr/> |
| Normal tax | | \$ 5,141.93 |
| Surtax | | 48,214.12 |
| Victory tax as returned..... | \$5,189.53 | |
| Deduct for corrections..... | 114.28 | 5,075.25 |
| | | <hr/> |
| Total tax admitted..... | | \$58,431.30 |
| | | <hr/> |
| In controversy | | \$ 4,761.37 |

VERIFICATION

State of California

County of Sacramento—ss.

Eleanor McClatchy, being duly sworn, deposes and says that she has read the petition to which this affidavit is attached and is familiar with the contents thereof, and that the statements contained therein are true, except those founded upon information and belief;—and that, as to such last-mentioned statements, she believes them to be true.

/s/ ELEANOR McCLATCHY.

Subscribed and sworn to before me this 5th day of March, 1947.

[Seal] /s/ HELEN McDUFF,

Notary Public in and for the County of Sacramento,
State of California.

State of California

County of San Francisco—ss.

Charlotte Maloney, being duly sworn, deposes and says that she has read the petition to which this affidavit is attached and is familiar with the contents thereof, and that the statements contained therein are true, except those founded upon information and belief;—and that, as to such last-mentioned statements, she believes them to be true.

/s/ CHARLOTTE MALONEY.

Subscribed and sworn to before me this 4th day of March, 1947.

[Seal] /s/ MARION M. BENDER,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires Dec. 24, 1950.

Received and filed March 7, 1947 T.C.U.S.

[Title of Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioners, admits, denies, and alleges as follows:

(1) Admits the allegations contained in paragraph (1) of the petition.

(2) Admits that the notice of deficiency was mailed to the petitioners on December 11, 1946; denies the remaining allegations contained in paragraph (2) of the petition.

(3) Denies the allegations contained in paragraph (3) of the petition and alleges that respondent has asserted a deficiency of \$8,639.98 in income tax for the taxable year 1942, and a deficiency of \$1,731.25 in income and victory tax for the taxable year 1943.

(4) (A), (B), (C), (D). Denies the allegations of error contained in subparagraphs (A), (B), (C), and (D) of paragraph (4) of the petition.

(5) (A)—(1) to (A)—(4), inclusive. Admits the allegations contained in subparagraphs (A)—(1) to (A)—(4), inclusive, of paragraph (5) of the petition.

(5) (B)—(1). For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph (B)—(1) of paragraph (5) of the petition.

For lack of knowledge or information sufficient to form a belief, denies the allegations contained in the three unnumbered paragraphs appearing on the third (unnumbered) page of the petition.

(5) (B)—(2) to (C)—(1), inclusive. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (B)—(2) to (C)—(1), inclusive, of paragraph (5) of the petition.

(5) (C)—(2). Admits that in 1939 the State

Tax Commissioner, acting under the provisions of Section 34 of the Personal Income Tax Act, asserted against Ella K. McClatchy additional income taxes for the years 1935 and 1936 totaling \$7,110.22 and that the tax was protested; denies the remaining allegations contained in subparagraph (C)—(2) of paragraph (5) of the petition.

(5) (C)—(3). Admits that Ella K. McClatchy died in September 1939; that on March 7, 1941 the State Supreme Court ruled against McCreery and held section 34 of the Personal Income Tax Act to be constitutional; and that the said tax of \$7,110.22, together with \$2,264.59 interest, was paid out of the funds of the Estate of Ella K. McClatchy; denies the remaining allegations contained in subparagraph (C)—(3) of paragraph (5) of the petition.

(5) (C)—(4). Admits the allegations contained in subparagraph (C)—(4) of paragraph (5) of the petition.

(5) (C)—(5). Admits that the report of the examining revenue agent in this case issued September 19, 1945; that in the examiner's report it is stated:

“These taxes [viz., the \$7,110.22 state taxes for 1935 and 1936] accrued on September 29, 1939, the date of death of the decedent. The deduction was allowable in the return of the decedent * * *.”; denies the remaining allegations contained in subparagraph (C)—(5) of paragraph (5) of the petition.

(5) (C)—(6). Admits that on October 9, 1945,

claim for refund of taxes paid by the decedent Ella K. McClatchy for 1939 was filed with the Collector at San Francisco and that this claim was denied by the Commissioner January 6, 1947; denies the remaining allegations contained in subparagraph (C)—(6) of paragraph (5) of the petition.

(5) (D)—(1). Admits that the State of California demanded additional inheritance taxes from the heirs of Ella K. McClatchy, together with interest on the said additional taxes amounting to \$2,-223.41, and that this interest (as well as the additional tax) was paid in December 1943; denies the remaining allegations contained in subparagraph (D)—(1) of paragraph (5) of the petition.

(6). Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioners' appeal denied.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of
Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
LEONARD A. MARCUSSEN,
Special Attorneys,

Bureau of Internal Revenue.

Received and filed May 7, 1947 T.C.U.S.

The Tax Court of the United States

Docket No. 13214

ESTATE OF ELLA K. McCLATCHY,
ELEANOR McCLATCHY and
CHARLOTTE MALONEY, Executrices,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 13215

CHARLOTTE MALONEY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 13216

ELEANOR McCLATCHY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION

It is hereby stipulated and agreed that the above-entitled proceedings may be consolidated for opinion and submitted under Rule 30 of the Tax Court's Rules of Practice. [In Pen] & Stip. of facts.

It is further stipulated and agreed that the following facts are true:

1. Eleanor McClatchy and Charlotte Maloney are now and have been the executrices of the last will of Ella K. McClatchy (Est. of Ella K. McClatchy—Docket No. 13214) and the taxes which are in controversy are

(a) Deficiency in income tax for the year 1942 asserted by the Commissioner in the amount of \$8,-639.98;

(b) Deficiency in income and victory taxes for the year 1943 asserted by the Commissioner in the amount of \$1,731.25 and

(c) Claimed overpayment in the amount of \$1,-912.12 for the taxable year 1943.

2. The petitioner Charlotte Maloney, Docket No. 13215, is the sole beneficiary of Charles K. McClatchy Trust No. 2 which trust was entitled to and did receive one-third of the estate of said decedent, and the taxes in controversy are income and victory taxes for the calendar year 1943 in the aggregate amount of \$213.54.

3. The petitioner Eleanor McClatchy, Docket No. 13216, is the sole beneficiary of Charles K. McClatchy Trust No. 1 which trust was entitled to and did receive one-third of the estate of said decedent, and the taxes in controversy are income and victory taxes for the calendar year 1943 in the aggregate amount of \$2,904.43.

4. Ella K. McClatchy died September 23, 1939, and Charles K. McClatchy died April 27, 1936.

5. During the lifetime of Ella K. McClatchy but after the death of Charles K. McClatchy, to wit, on January 23, 1939, the Franchise Tax Commissioner of the State of California, acting pursuant to section 34 of the Personal Income Tax Act of 1935, assessed additional income taxes against Ella K. McClatchy in the amount of \$1,797.05 and assessed additional income taxes against Charles K. McClatchy in the amount of \$1,791.64 for the taxable period ending December 31, 1935.

6. On April 1, 1940, said Franchise Tax Commissioner levied an additional income tax against Ella K. McClatchy in the amount of \$5,313.17 and against the Estate of Charles K. McClatchy in the amount of \$2,170.44, for the taxable period ending December 31, 1936.

7. Section 34 of the California Personal Income Tax Act of 1935 (the basis for the additional income taxes above mentioned) was attacked in the state courts as unconstitutional. Payment of the additional taxes was protested and payment thereof was not made pending a determination of the constitutionality of the statute under which said additional taxes were assessed.

8. Section 34 of said act was upheld as constitutional by the Supreme Court of California on March 7, 1941, and thereafter, on or about May 5, 1942, petitioner in Docket No. 13214 paid said additional taxes asserted against Ella K. McClatchy in the total sum of \$7,110.22 plus interest thereon in the sum of \$2,264.59. The additional taxes asserted

against Charles K. McClatchy and his estate totaling \$3,932.08, together with \$1,309.33 interest, were paid on or about May 5, 1942, out of the funds of the three testamentary trusts created by the will of Charles K. McClatchy. One-third of the amount, or \$1,747.14, was paid by the Charles K. McClatchy Trust No. 2 of which the petitioner in Docket No. 13215 was the sole beneficiary, and \$1,747.14 was paid by the Charles K. McClatchy Trust No. 1, of which the petitioner in Docket No. 13216 was the sole beneficiary.

9(a). The Federal income tax return for the year 1942 filed for the Estate of Ella K. McClatchy showed an income tax liability of \$59,289.89 which was paid to the Collector of Internal Revenue at San Francisco. In said return for the year 1942 there were claimed deductions for said sum of \$7,110.22 additional California state income tax paid in that year and interest thereon in the sum of \$2,264.59.

9(b). Thereafter in February, 1947, additional Federal income taxes for the year 1942 in the sum of \$1,669.93 and interest of \$362.05 were paid for said estate, computed upon items not in controversy herein and the amount of said additional tax was not credited by the Commissioner in his deficiency letter of December 11, 1946, a copy of which is attached to the petition herein.

10(a). The Federal income and victory tax return of the Estate of Ella K. McClatchy for the year 1943 was filed with the Collector of Internal

Revenue for the First District of California on March 14, 1944, showing an income and victory tax liability of \$60,396.92, which amount was paid in two installments, the first installment of \$15,-099.23 having been paid on March 14, 1944, and the final installment of \$45,297.69 on March 27, 1944.

10(b). On February 6, 1947, an additional Federal income tax for the year 1943 in the sum of \$1,064.50, together with interest in the sum of \$166.92, was paid by the Estate of Ella K. McClatchy, computed upon items not in controversy herein, and the amount of said additional tax was not credited by the Commissioner in his deficiency letter of December 11, 1946, a copy of which is attached to the petition herein.

11. In determining the deficiencies against these petitioners the respondent has disallowed the deduction claimed by the Estate of Ella K. McClatchy in the sum of \$7,110.22 for 1942 and \$1,150.67 interest accrued to the date of said decedent's death out of the total interest of \$2,264.59 specified in paragraph 9 herein, and has disallowed the deduction of \$1,747.14 claimed by each of the petitioners Charlotte Maloney and Eleanor McClatchy in their income and victory tax returns for the year 1943 filed with the Collector at San Francisco.

12. In December, 1942, said Franchise Tax Commissioner for the State of California assessed against Ella K. McClatchy, deceased, an additional

income tax of \$271.42 for the year 1938. This tax plus \$63.85 interest was paid April 1, 1943. In December, 1942, a like assessment was made for 1939 in the amount of \$543.40. This amount plus \$101.03 interest was paid in two installments, \$156.53 on May 21, 1943, and \$487.90 on June 5, 1943.

13. In December, 1943, the State of California assessed additional inheritance taxes against the Estate of Ella K. McClatchy in the amount of \$5,304.41, together with interest thereon, in the amount of \$2,223.41. The additional tax and interest thereon in said amount was paid by the McClatchy Newspapers and charged on their books to the three testamentary trusts of Charles K. McClatchy. The three trusts claimed the tax and interest as a deduction in their returns for 1943 which deduction was disallowed by the Commissioner of Internal Revenue.

14. The Estate of Ella K. McClatchy claimed that the charge by McClatchy Newspapers to the three C. K. McClatchy trusts had been erroneous and that the charge should have been made to the Estate of Ella K. McClatchy and the correction was accordingly made on June 1, 1944 on the books of the McClatchy Newspapers. Said returns were filed on the cash receipts and disbursements basis. No deduction was claimed by the Estate of Ella K. McClatchy in its Federal income tax return for the year 1943 for said interest payment and said amount has not been claimed or allowed as a deduc-

tion in the return of the Estate of Ella K. McClatchy for any taxable year.

15. On October 9, 1945, the Estate of Ella K. McClatchy filed its claim for refund of income taxes allegedly overpaid in the amount of \$5,788.28 for the year 1939. Said claim for refund was denied by the Commissioner on January 6, 1947.

16(a). The Federal estate tax return of the Estate of Charles K. McClatchy was filed July 24, 1937 and final settlement of the estate tax liability was effected May 14, 1940.

16(b). The Federal estate tax return of the Estate of Ella K. McClatchy was filed December 20, 1940. A closing agreement was executed between the Commissioner and the executrices of the Estate of Ella K. McClatchy on June 11, 1942.

17. In the Federal estate tax returns of the Estate of Ella K. McClatchy and the Estate of Charles K. McClatchy no deduction was taken under section 812(b) of the Internal Revenue Code for the amount of additional income taxes paid to the State of California and specified in Paragraphs 5, 6 and 12 hereof. No waivers or consents have been filed by or on behalf of said estates by the executrices or any beneficiaries with the respondent pursuant to section 134 of the Revenue Act of 1942 or section 126 of the Internal Revenue Code and the regulations promulgated by the Commissioner thereunder.

18. No deduction for any of said amounts assessed by the State of California as additional in-

come taxes for either of the years 1935 or 1936 against Ella K. McClatchy, or for interest thereon, was claimed by the Estate of Ella K. McClatchy in the final income tax returns of said decedent.

19. No deduction for interest on said additional inheritance tax assessed by the State of California has been taken by the Estate of Ella K. McClatchy in any Federal tax return.

20. It is requested that the Tax Court fix the time for filing briefs in accordance with Rule 35 of the Tax Court's Rules of Practice, the opening briefs to be filed 45 days from the date this stipulation is filed with the Tax Court.

/s/ JOHN W. BURROWS,

Counsel for Petitioners.

/s/ CHARLES OLIPHANT,

Chief Counsel,

Bureau of Internal Revenue,

Counsel for Respondent.

Of Counsel:

/s/ JOHN J. HAMLYN,

for Petitioners.

B. H. NEBLETT,

Division Counsel,

T. M. MATHER,

Special Attorney,

Bureau of Internal Revenue,

For Respondent.

Received and filed May 19, 1948 T.C.U.S.

[Title of Court and Cause.]

SUPPLEMENTAL STIPULATION

It is hereby stipulated and agreed, supplementary to the stipulation filed in the above consolidated cases pursuant to Rule 30 of the Rules of Practice of the Tax Court of the United States, that the following facts are true:

1. The beneficiaries of the three trusts created by Charles K. McClatchy, deceased, including petitioners Charlotte Maloney and Eleanor McClatchy, were also at all times subsequent to September 23, 1939, (the date of death of Ella K. McClatchy), the beneficiaries, respectively, of the three trusts created by the last will of Ella K. McClatchy, deceased.

2. That the interest on the additional inheritance tax levied by the State of California, in the amount of \$2,223.41, as specified in Paragraph 13 of the Stipulation of Facts, was claimed by said beneficiaries in their returns for 1943 as a deduction, but that the tax itself was not so claimed. That said interest was disallowed as a deduction.

3. That the final Federal income tax return for Charles K. McClatchy, deceased, was filed with the Collector of Internal Revenue on or about March 15, 1937, and the final Federal income tax

return for Ella K. McClatchy, deceased, was filed on or about March 15, 1940.

/s/ JOHN W. BURROWS, CPA,
Counsel for Petitioners.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Of Counsel:

/s/ JOHN J. HAMLYN,
for Petitioners.

B. H. NEBLETT,
Division Counsel,

T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue,
For Respondent.

Received and filed Aug. 23, 1948 T.C.U.S.

The Tax Court of the United States
Washington

Docket No. 13214

ESTATE OF ELLA K. McCLATCHY, ELEA-
NOR McCLATCHY and CHARLOTTE MA-
LONEY, EXECUTRICES,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion promulgated in the above entitled proceeding on March 18, 1949, counsel for respondent filed a recomputation of petitioner's tax liability on April 13, 1949. Hearing under Rule 50 was held on May 11, 1949, at which time no appearance was made on behalf of petitioner, and respondent's computation has not been contested. Now, therefore, after due consideration, it is

Ordered and Decided: That there is a deficiency in petitioner's income tax for the year ended December 31, 1942, in the amount of \$8,639.98, and that there is a deficiency in petitioner's income and victory tax for the year ended December 31, 1943, in the amount of \$1,731.25.

[Seal] /s/ JOHN W. KERN,

Judge.

Entered May 12, 1949.

Served May 13, 1949.

The Tax Court of the United States
Washington

Docket No. 13215

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion promulgated in the above entitled proceeding on March 18, 1949, counsel for respondent filed a re-computation of petitioner's tax liability on April 13, 1949. Hearing under Rule 50 was held on May 11, 1949, at which time no appearance was made on behalf of petitioner, and respondent's computation has not been contested. Now, therefore, after due consideration, it is

Ordered and Decided: That there is a deficiency in petitioner's income and victory tax for the year ended December 31, 1943, in the amount of \$213.54.

[Seal] /s/ JOHN W. KERN,

Judge.

Entered May 12, 1949.

Served May 13, 1949.

The Tax Court of the United States
Washington

Docket No. 13216

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion promulgated in the above entitled proceeding on March 18, 1949, counsel for respondent filed a re-computation of petitioner's tax liability on April 13, 1949. Hearing under Rule 50 was held on May 11, 1949, at which time no appearance was made on behalf of petitioner, and respondent's computation has not been contested. Now, therefore, after due consideration it is

Ordered and Decided: That there is a deficiency in petitioner's income and victory tax for the year ended December 31, 1943, in the amount of \$2,904.43.

[Seal] /s/ JOHN W. KERN,
Judge.

Entered May 12, 1949.

Served May 13, 1949.

[Title of Court and Cause]

P E T I T I O N FOR REVIEW BY UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

The above-named Estate of Ella K. McClatchy, Eleanor McClatchy and Charlotte Maloney, Executrices, files the within petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States, rendered in the above-entitled case on March 18, 1949.

I.

Jurisdiction

The decision of the Tax Court aforesaid was entered on May 12, 1949, and found a deficiency in income tax due from your petitioner for the calendar year 1942 in the amount of \$8639.98, and further deficiency for the year 1943 in the amount of \$1,731.25.

Petitioner at the time of filing this petition is an estate administered in the County of Sacramento, State of California. Eleanor McClatchy and Charlotte Maloney, the executrices of said estate, are both residents of the State of California.

The tax returns in respect of which the said liability arose were filed by petitioner with the Collector of Internal Revenue for the First Collection District of California, located in the City of San Francisco in the State of California, which is within the jurisdiction of this court.

II.

Nature of Controversy

1. The controversy in this case arises by reason

of the income tax deficiency for the taxable year 1942 in the amount of \$8,639.98, and the income and victory tax deficiency for the year 1943 in the amount of \$1,731.25, respectively, asserted by respondent against petitioner, based upon the following items:

(a) Disallowance of the deduction claimed by petitioner in its income tax return for the year 1942 for the payment in said year of additional California state income taxes assessed against Ella K. McClatchy for the years 1935 and 1936, in the total amount of \$7,114.22, together with interest thereon accrued to the date of death of Ella K. McClatchy in the amount of \$1,150.67.

(b) Disallowance of deduction claimed by petitioner for interest paid on additional inheritance tax levied by the State of California in the year 1943 against petitioner, said interest being in the amount of \$2,223.41.

2. Petitioner has paid Federal income taxes for the taxable year 1942 and assessed in January, 1947, in the amount of \$1,669.93 for which petitioner is entitled to credit in the determination of petitioner's tax liability for the year 1942. Said payment was not taken into account by the Tax Court in its said decision.

3. Petitioner has likewise paid Federal income taxes for the year 1943 and assessed in January, 1947, in the amount of \$1,064.50, for which petitioner is entitled to credit in the determination of petitioner's tax liability for the year 1943. Said

payment was not taken into account by the Tax Court in its said decision.

4. Petitioner also claims an overpayment of \$1,912.12 in its income and victory tax for the year 1943, which claim is resisted by respondent.

/s/ JOHN J. HAMLYN,

Attorney and Counsel for
Petitioner.

State of California,
County of Sacramento—ss.

John J. Hamlyn, being duly sworn, deposes and says that he is an attorney-at-law and counsel of record for the petitioner in this proceeding, that he caused to be prepared the foregoing petition and is familiar with the contents thereof, that allegations of fact therein are true to the best of his knowledge, information and belief, that said petition is not filed for the purpose of delay, and that he believes the petitioner is justly entitled to the relief sought.

/s/ JOHN J. HAMLYN,

Attorney and Counsel for
Petitioner.

Subscribed and sworn to before me this 4th day of June, 1949.

[Seal] /s/ HELEN McDUFF,

Notary Public in and for the County of Sacramento,
State of California.

My Commission Expires March 22, 1950.

Received and filed June 14, 1949 T.C.U.S.

[Title of Court and Cause]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 12, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Praecipe" in the proceeding before The Tax Court of the United States entitled "Estate of Ella K. McClatchy, Eleanor McClatchy, and Charlotte Maloney, Executrices, Petitioners, v. Commissioner of Internal Revenue, Respondent," Docket No. 13214, and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 11th day of July, 1949.

[Seal] /s/ VICTOR S. MERSCH,
Clerk.

[Endorsed]: Nos. 12289 - 12290 - 12291. United States Court of Appeals for the Ninth Circuit. Estate of Ella K. McClatchy, Eleanor McClatchy and Charlotte Maloney, Executrices, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Charlotte Maloney, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Eleanor McClatchy, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petitions to Review Decisions of the Tax Court of the United States.

Filed July 15, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

Docket No. 12289

ESTATE OF ELLA K. McCLATCHY, ELEA-
NOR McCLATCHY, and CHARLOTTE MA-
LONEY, Executrices,

Petitioner,

vs.

COMMISSSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS RELIED
ON BY PETITIONER

Petitioner in the above cause, in accordance with

Rule 19, herewith states the points upon which it relies in the review of the decision of the Tax Court of the United States:

1. The additional California state income taxes for the years 1935 and 1936, assessed against Ella K. McClatchy after her death, and protested by petitioner, did not accrue until March 7, 1941, the date when the statute under which said tax was levied, was declared constitutional by the California Supreme Court. Petitioner was, therefore, entitled to take the deduction for said taxes in its 1942 income tax return.

2. The filing of waivers or consents under Section 134 of the Revenue Act of 1942, or under Section 126 of the Internal Revenue Code, was unnecessary and would have constituted an entirely idle act, since petitioner had nothing to waive or consent to, in view of the fact that the Statute of Limitations prevented petitioner from taking the deduction for the payment of said state taxes in either the final return of the decedent, or the federal estate tax return.

3. Petitioner is entitled to relief from the effect of the Statute of Limitations and the determination of the Tax Court of the United States by reason of Section 3801 of the Internal Revenue Code.

4. Petitioner is entitled to have a credit on its tax liability for the amount of \$1,669.93, assessed in January, 1947, and paid by petitioner.

5. Petitioner is entitled to a decision that petitioner has overpaid its income and victory tax for the year 1943 in the sum of \$1,912.12.

JOHN J. HAMLYN,

Attorney for petitioner.

Dated: August 4, 1949.

[Endorsed]: Filed Aug. 5, 1949.

[Title of Court of Appeals and Cause.]

AMENDED DESIGNATION OF RECORD
FOR PURPOSE OF REVIEW

Petitioner in the above cause, pursuant to Rule 19, herewith designates the portion of the record which is material to consideration of the review of the decision of the Tax Court of the United States, as follows:

1. The petition.
2. The answer to the petition.
3. The stipulation of facts.
4. The supplemental stipulation of facts.
5. The decision of the Tax Court of the United States.

Dated: August 20, 1949.

/s/ JOHN J. HAMLYN,

Attorney for Petitioner.

[Endorsed]: Filed Aug. 22, 1949.

United States Court of Appeals
For the Ninth Circuit

Docket No. 12289

ESTATE OF ELLA K. McCLATCHY, ELEA-
NOR McCLATCHY, and CHARLOTTE MA-
LONEY, Executrices,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 12290

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 12291

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STIPULATION RE CONSOLIDATION
OF CAUSES ON REVIEW

It is hereby stipulated and agreed by the parties
to the above-entitled causes, through their respec-

tive counsel, that said causes may be consolidated into one cause for the purposes of a review of the decision of the Tax Court of the United States by the United States Court of Appeals for the Ninth Circuit. It is further stipulated that hearing of said motion and notice of hearing thereon are waived.

Dated: August 5, 1949.

/s/ JOHN J. HAMLYN,

Attorney for petitioners.

/s/ CHARLES OLIPHANT,

General Counsel,

Bureau of Internal Revenue,

Attorney for respondent.

Filed Aug. 19, 1949. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION
OF CAUSES ON REVIEW

Come now petitioners in the above causes and move this honorable court for an order consolidating said causes into one cause for the purposes of a review of the decision of the Tax Court of the United States by the United States Court of Appeals for the Ninth Circuit.

/s/ JOHN J. HAMLYN,

Attorney for petitioners.

To the Commissioner of Internal Revenue, Respondent herein, and to Charles Oliphant, his counsel:

Please take notice that the undersigned, counsel for petitioners, will bring the above motion on for hearing before this Court on the 22nd day of August, 1949 in the court room of said Court in the City of San Francisco, California, at 10 o'clock a.m. of said day, or as soon thereafter as counsel may be heard.

Dated: August 18, 1949.

/s/ JOHN J. HAMLYN,

Counsel for Petitioners.

Points and Authorities

The court may, in causes of a like nature or relative to the same question, consolidate said causes when it appears reasonable to do so. (28 U.S. Code, Sec. 734.)

Consolidation of causes may be made for the purposes of avoiding unnecessary costs or delay. (Davis vs. St. Louis, 25 Fed. 786; Adler vs. Seaman, 266 Fed. 828, Cert. Den. 254 U. S. 655; 28 U. S. Code, Sec. 734.)

So Ordered:

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ HOMER BONE.

/s/ WM. E. ORR,

United States Circuit Judges.

Nos. 12289-12290-12291

United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ELLA K. McCLATCHY, ELEANOR
McCLATCHY and CHARLOTTE MALONEY,
Executrices,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioners' Brief

Upon Petitions to Review Decisions of the Tax Court
of the United States.

FILED

NOV 13 1949

PAUL P. O'BRIEN,

CLERK

Nos. 12289-12290-12291

United States
Court of Appeals
For the Ninth Circuit

ESTATE OF ELLA K. McCLATCHY, ELEANOR
McCLATCHY and CHARLOTTE MALONEY,
Executrices,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CHARLOTTE MALONEY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELEANOR McCLATCHY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petitioners' Brief

Upon Petitions to Review Decisions of the Tax Court
of the United States.

Petitioners' Brief

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Appearances

For Petitioners:

JOHN J. HAMLYN

WENTWORTH L. KILGORE

For Respondent:

THERON L. CAUDLE

CHARLES OLIPHANT

Statement of Pleadings and Jurisdiction

The above consolidated cases were instituted by the filing in the Tax Court of the United States, (hereinafter referred to as the Tax Court for the purpose of brevity), pursuant to section 272 (a), (1) of the Internal Revenue Code, of petitions for re-determination of the respective deficiencies determined by Respondent specified in the Stipulation of Facts filed in said court, appearing on page 23 of the Transcript of Record herein. The Tax Court, upon consideration of the pleadings, stipulation of facts and briefs, entered its respective decisions (pages said determinations of deficiencies by Respondent. Petitions for a review of said decisions were filed in this court pursuant to section 1142 of the Internal Revenue Code, which provides that the Court of Appeals for the circuit wherein the office of the Collector of Internal Revenue is located (where the taxpayer files his return), shall have jurisdiction to review a decision of the Tax Court. Petitioners filed their returns with the Collector of Internal Revenue at San Francisco, California, within the Ninth Judicial Circuit.

Statement Of Case

The Commissioner of Internal Revenue determined the following deficiencies against petitioner:

| Petitioner | Income Tax | Income and Victory |
|--------------------------------------|------------|-----------------------|
| | 1942 | Tax, 1943 |
| 1. Estate of Ella K. McClatchy | \$8,639.98 | \$1,731.25 |
| 2. Charlotte Maloney | | 213.54 |
| 3. Eleanor McClatchy | | 2,904.43 |

The year 1942 is involved in deficiencies numbered 2 and 3 above by reason of the Current Tax Payment Act of 1943.

Petitioners claimed deductions in the year 1942 for payments of income taxes in that year to the State of California, said income taxes having been assessed against Charles K. McClatchy and Ella K. McClatchy, both deceased. These deductions were disallowed by Respondent.

Petitioner Estate of Ella K. McClatchy also claimed deduction of interest paid to the State of California on an inheritance tax deficiency assessed by said state.

An issue as to dividends received was raised originally by Petitioners, but is not raised by them with respect to this review.

Petitioners, Charlotte Maloney and Eleanor McClatchy are the beneficiaries of two of the three trusts created by Charles K. McClatchy, who died April 27, 1936, known as Trusts Nos. 1 and 2, respectively, each trust receiving one-third of his estate. They are also the executrices of the Estate of Ella K. McClatchy, who died September 23, 1939, one of the Appellants in this cause. The tax returns involved were all filed with the collector for the First District of California at San Francisco.

After the respective deaths of said decedents, the Franchise Tax Commissioner of the State of California, pursuant to section 34 of the Personal Income Tax Act of 1935 assessed additional state income taxes against Charles K. McClatchy and Ella K. McClatchy, as follows:

| Date of Assessment | Charles K. McClatchy Taxpayer | Ella K. McClatchy Amount | Taxable Period Ended Dec. 31 |
|-----------------------|----------------------------------|-----------------------------|---------------------------------|
| Jan. 23, 1939 | \$1,791.64 | \$1,797.05 | 1935 |
| Apr. 1, 1940 | 2,170.44 | 5,317.17 | 1936 |
| Totals | \$3,962.08 | \$7,114.22 | |

Payment of these taxes was protested and withheld pending the determination of the constitutionality of section 34 of the California Personal Income Tax Act of 1935.

On March 7, 1941, the Supreme Court of California determined that section 34 was constitutional. Payment on behalf of the two decedents was made on May 5, 1942 as follows:

| Decedent | Deficiency | Interest | Paid by | Amount |
|-------------------------------|------------|------------|--------------|------------|
| Charles K. McClatchy | \$3,932.08 | \$1,309.33 | Trust No. 1 | \$1,747.14 |
| | | | Trust No. 2 | 1,747.14 |
| | | | Trust No. 3 | 1,747.14 |
| Ella K. McClatchy | 7,110.22 | 2,264.59 | Total | \$5,241.42 |
| | | | Estate | 9,374.81 |

No claim for the deduction of the taxes in question, assessed against Charles K. McClatchy and paid by the three testamentary trusts, was made in that decedent's final Federal income tax returns, filed March 15, 1937, or in said decedent's Federal estate tax return, which was filed July 24, 1937, and finally settled May 14, 1940. Deductions on account of the payment of these taxes plus interest were taken in 1942 by the parties paying them in that year.

The Commissioner increased the income distributable to petitioners Eleanor McClatchy and Char-

lotte Maloney from the Charles K. McClatchy Trusts Nos. 1 and 2, respectively, in the amount of \$1,747.14, each for the year 1942.

No consents or waivers were filed pursuant to section 134 of the 1942 Revenue Act or section 126 of the Internal Revenue Code, and the appropriate Regulations.

The Commissioner allowed the Estate of Ella K. McClatchy a deduction for 1942 Federal income tax purposes of \$1,113.92, representing interest on the state income tax deficiency accrued since the death of said Ella K. McClatchy. The deduction of the \$7,110.22 state income tax and \$1,150.67 of the total interest thereon was disallowed.

Section 34 of the California Personal Income Tax Act of 1935 was repealed in 1937.

In December, 1942, the State Franchise Tax Commissioner assessed additional deficiencies in income tax against Ella K. McClatchy as follows:

| Taxable Year | Tax | Interest | Total |
|--------------|----------|----------|----------|
| 1938 | \$271.42 | \$ 63.85 | \$335.27 |
| 1939 | 543.40 | 101 03 | 644.43 |
| Totals | \$814.82 | \$164.88 | \$979.70 |

These amounts were paid by the estate and claimed as a deduction in 1943. The Commissioner disallowed the deduction of the state income taxes in the total amount of \$814.82 and \$7.22 of the interest that had accrued before the death of Ella K. McClatchy.

Ella K. McClatchy's final Federal income tax return covering the year 1939 up to the time of her

death was filed March 15, 1940. On October 9, 1945, the estate filed a claim for refund of income taxes allegedly overpaid in the amount of \$5,788.28 for the year 1939. The refund was denied January 6, 1947. Her Federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. The deductions in question were not taken in either the final income tax return or the estate tax return. No waivers or consents were filed pursuant to section 134 (g) of the Revenue Act of 1942 or section 126 of the Internal Revenue Code and the applicable regulations.

In December, 1943, additional California inheritance taxes of \$5,304.41, plus interest of \$2,223.41, were assessed and paid in 1943 in connection with the Estate of Ella K. McClatchy. The beneficiaries of the Charles K. McClatchy trusts were also the beneficiaries of three trusts created by the last will of Ella K. McClatchy. The tax and interest were paid by the McClatchy Newspapers and charged against the three testamentary trusts of Charles K. McClatchy. The three trusts claimed a deduction of the interest in their returns for 1943 which was disallowed by the Commissioner.

On June 1, 1944, the petitioner estate contended that the payments were improperly made by the trusts, and accordingly the McClatchy Newspapers corrected these charges on their books and showed them made against petitioner estate. The estate now claims the deduction for 1943 of the interest

on the inheritance taxes. No other claim for the interest deduction has been allowed.

The returns in question were filed on the cash receipts and disbursement basis.

Specification Of Errors

1. The Tax Court erred in sustaining the respective deficiencies asserted by Respondent.

2. The Tax Court erred in sustaining the disallowance by Respondent of the deductions claimed by Petitioners for payment of additional California state income taxes assessed in 1939 and 1940 against Charles K. McClatchy and Ella K. McClatchy, both deceased, for the taxable years 1935 and 1936, respectively in the amounts above set forth.

3. The Tax Court erred in affirming the disallowance by Respondent of the item of interest on the California state inheritance tax deficiency assessed against the Estate of Ella K. McClatchy, deceased.

Argument

The questions of law involved in the above case are fourfold:

1. Whether or not the additional state income taxes assessed against the two decedents above named had accrued prior to March 7, 1941, the date on which the Supreme Court of California determined that section 34 of the California Personal Income Tax Act of 1935 was constitutional, pay-

ment of said taxes having been made in 1942 and deduction claimed for that year.

2. Whether or not consents or waivers were required of Petitioners under section 134 (g) of the Revenue Act of 1942 or section 126 of the Internal Revenue Code and appropriate regulations.

3. Whether or not the interest on the California inheritance tax deficiency assessed against the Estate of Ella K. McClatchy was a deductible item under the Internal Revenue Code.

4. Whether or not the running of the time of limitation provided by section 322(b) of the Internal Revenue Code together with the determination of the Tax Court, gives Petitioners a remedy to claim the deductions nevertheless under section 3801 of the Internal Revenue Code.

1. **Accrual of State Taxes.** It is the contention of Petitioners in this cause that the additional California state income taxes did not accrue until March 7, 1941, the date the state Supreme Court declared constitutional section 34 of the Personal Income Tax Act, the section upon the authority of which such taxes were levied. (Page 24, Transcript of Record).

The Board of Tax Appeals decided in the case of **J. A. Dougherty's Sons**, 42 B.T.A. 892 that the taxes involved therein had not accrued because the statute under which such taxes were levied was contested and was later declared unconstitutional. Previously, the same board had stated, (**Central National Bank of Cleveland v. Commissioner**, 35 B.T.A. 489)

that no basis for accrual existed in the matter of interest claimed on the final return of a decedent if "the events fixing the liability did not transpire until after the decedent's death."

The rule was applied to a case involving the deduction for expenses incurred in settling litigated claims against a decedent in **Estate of Lambert**, 40 B.T.A., 802. Here the Revenue Act of 1934 governed, the deduction having been claimed under section 43. The actions on the claims were not begun until after decedents' death, but they were based upon transactions occurring prior thereto. The amounts due the claimants were not liquidated until almost two years after his death. The Board of Tax Appeals held that there was no basis for accrual of the items, since in no case was decedent's liability fixed and determined before his demise. Thus the contested payments for expenses were not accrued up to the date of death within the meaning of the statute.

It is true there was a conflict of authority as between different circuits of the Court of Appeal following the **J. A. Dougherty's Sons case**, but the United States Supreme Court, in **Dixie Pine Products Company v. Commissioner**, 320 U. S. 516, 64 Sup. Ct. 364, pointing out the existence of the conflict, and taking the case to clarify the law, held that a state tax, the payment of which has been protested, and liability for which is denied, does not accrue until the fact of liability becomes fixed and certain. The court said that the taxpayer on

the accrual basis could not deduct the payment of a state tax which he is contesting in the state courts until the liability is fixed.

Petitioners submit that the **Dixie Pine Products Company** case did not establish a new rule, but that it merely reaffirmed what the rule actually was, as declared by the Board of Tax Appeals in the **J. A. Dougherty's Sons** case and other decisions. It merely decided that the theory underlying the decisions exemplified by **Commissioner v. Central United National Bank**, (1938), 99 Fed. (2d.) 568, was erroneous. The Supreme Court decision in the **Dixie Pine Products Company** case reaffirmed the principles of the holding in **Brown v. Helvering**, 291 U. S. 193, 54 Sup. Ct. 356, that truly contingent liabilities do not accrue for income tax purposes and may not be deducted as accrued. The rule was later affirmed by the Supreme Court in **Security Flour Mills Company v. Commissioner**, 321 U. S. 281, 64 Sup. Ct. 596.

In **Commissioner v. U. S. Trust Company**, 143 Fed.

(2d) 243, the court suggested that, with respect to contingent and undetermined liabilities, it makes no difference whether the taxpayer is on the cash or the accrual basis. (On accrual of tax, see also: **The Baltimore and Ohio Railroad Co. v. Magruder**, 77 Fed. Supp. 156; **Burton-Sutton Oil Company v. Commissioner**, 3 T. C. 1187; **Street & Smith Publications, Inc. v. U. S.**, 38 Fed. Supp. 461; and **William Justin Petit**, 8 T. C. 228.)

Applying this rule to the instant case, the addi-

tional state income taxes which, it should be noted, were assessed against the two taxpayers **after their deaths**, did not accrue until March 7, 1941, when the validity of the contested tax was finally determined. Petitioners claimed deductions for the taxes for the years when paid. At the time Respondent assessed the deficiencies involved in the instant cases, Petitioners were foreclosed by the statute of limitations (section 322 (b), Internal Revenue Code) from filing amended final income tax returns for said decedents, or either of them, and Petitioners, by reason of the disallowance by Respondent, have been unjustly deprived of any deduction for the state tax payments which would otherwise be clearly deductible under section 23, Internal Revenue Code. The injustice of such a result is manifest.

2. **Waivers or consents.** Petitioners were not required to file waivers or consents under section 126 Internal Revenue Code (section 134 (g), Revenue Act of 1942). The final Federal income tax return of Charles K. McClatchy was filed on March 15, 1937, before any additional state income tax was assessed against him. (Page 30, Transcript of Record). The final Federal income tax return of Ella K. McClatchy was filed on March 15, 1940, about a year prior to the determination that the state tax was valid. (Page 30, Transcript of Record). By reason of the delayed accrual of these state taxes, there was nothing for Petitioners to waive until the taxes did accrue. A taxpayer cannot waive a credit for a tax levy which legally does not exist. Since the taxes had not accrued, Petitioners were not entitled

to waive them with respect to the final Federal income tax returns of the respective decedents. It is apparent that Congress, in enacting section 134 (g), intended that the taxpayer be required to waive a presently existing right, not one which comes into existence, if at all, at a later date. By the time Petitioners were in a position to claim any deduction at all for the state taxes, the Statute of Limitations had foreclosed them from claiming credit therefor in the final income tax returns of the respective decedents.

With respect to the Federal estate tax of each decedent, Petitioners submit that the filing of consents or waivers under section 134 (g) of the Revenue Act of 1942 was neither required nor in order, in view of the fact that the state taxes had not accrued prior to death, under the doctrine of the **Dixie Pine Products Company** case. Consents of this kind, insofar as they waive a right to deduction for purpose of Federal estate tax are manifestly required only where the amounts which would otherwise be claimed as deductions from said tax have accrued as a liability of the decedent **prior to his death**. In the instant case, as noted above, the additional state income taxes did not accrue (in fact they were not even levied in the first instance) prior to the death of either decedent. Such taxes were therefore not a legal charge against either estate, and there was absolutely nothing for Petitioners to waive.

In the case of **Estate of Ingraham**, 8 T. C. 701,

the Tax Court held that the filing of consents under section 134 (g) of the 1942 Act was required in the case of an estate. However, it should be noted that the testator had died on June 26, 1942, and the estate had failed to file consents for the deduction of dividends and interest which had accrued **prior to the death** of the decedent, Ingraham.

3. Deduction for Interest on Additional Inheritance Tax. Petitioner Estate of Ella K. McClatchy should be allowed the claimed deduction for interest amounting to \$2,223.41 on the additional inheritance tax paid by McClatchy Newspapers and erroneously charged to the Charles K. McClatchy trusts, and later corrected so as to charge the appellant estate. (Page 27, Transcript of Record.)

Under section 14101 of the California Revenue and Taxation Code, the executor or administrator is specifically made liable for the payment of the tax, and liability continues until that tax is paid. Section 14121 of the same code provides that he must deduct the amount of the tax from each share to be distributed and is not required to distribute any share until the tax is deducted or collected. The California Supreme Court has said that the personal representative is primarily liable for the payment of the tax and it is chargeable against the money and other property of the estate in his hands. **Cohn, v. Cohn**, 20 Cal. 2d. 65, 123 P. (2d), 833.

4. Statutory Relief. Petitioners are entitled to relief from the injustice resulting from the disallow-

ance of their claimed deductions and the running of the Statute of Limitations, by reason of section 3801, Internal Revenue Code, which was enacted for the purpose of relieving a taxpayer from a determination such as the decisions of the Tax Court in this case.

Respectfully submitted,
JOHN J. HAMLYN,
Attorney for Petitioners.

WENTWORTH L. KILGORE,
Of Counsel for Petitioners.

**In the United States Court of Appeals
for the Ninth Circuit**

ESTATE OF ELLA K. McCLATCHY, ELEANOR McCLATCHY
AND CHARLOTTE MALONEY, EXECUTRICES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

CHARLOTTE MALONEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ELEANOR McCLATCHY, PETITIONER

v.

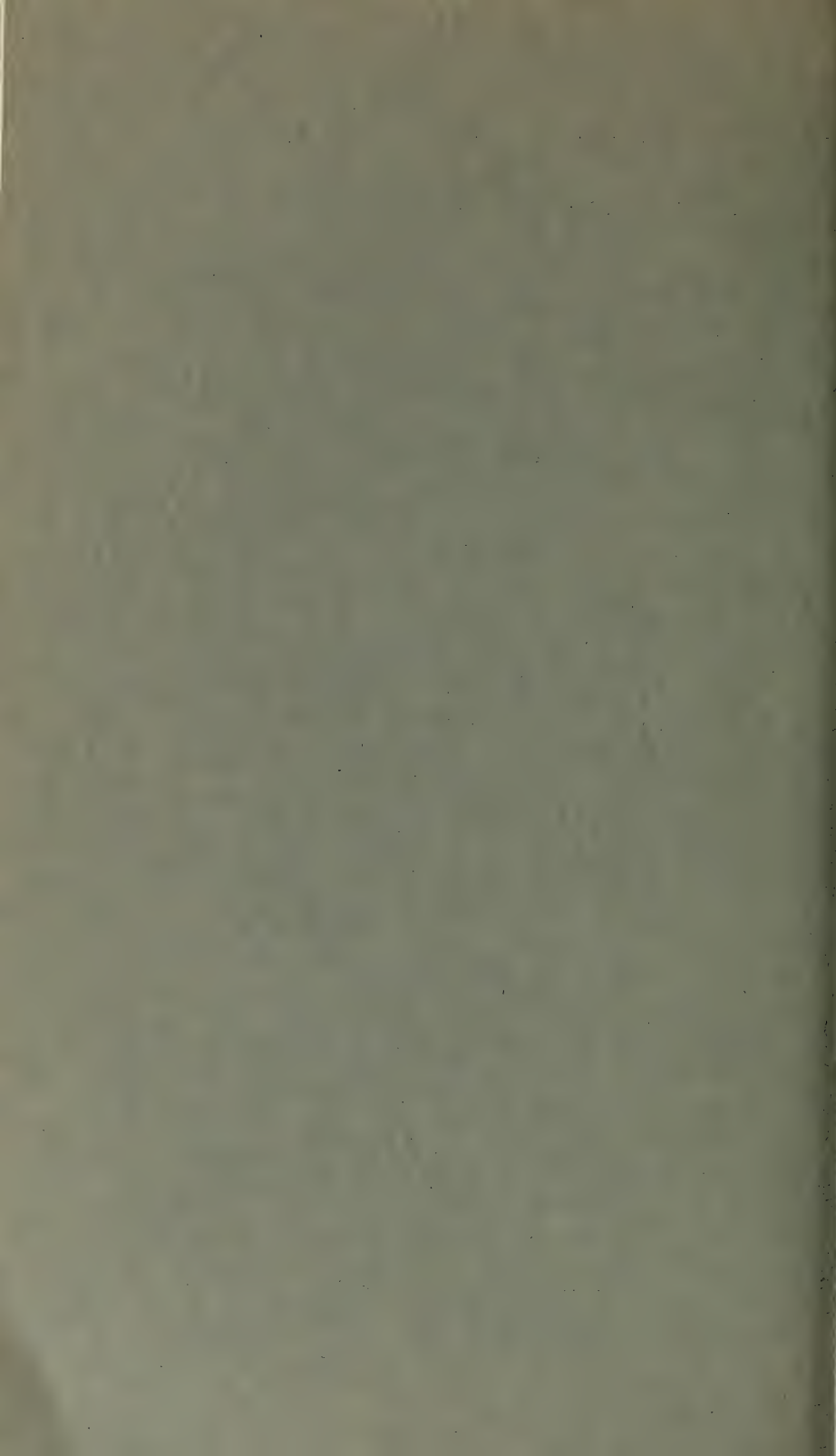
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
MARYHELEN WIGLE,
Special Assistants to the Attorney General.



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12289

ESTATE OF ELLA K. McCLATCHY, ELEANOR McCLATCHY
AND CHARLOTTE MALONEY, EXECUTRICES, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

No. 12290

CHARLOTTE MALONEY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

No. 12291

ELEANOR McCLATCHY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

These cases were consolidated and submitted for
opinion under Rule 30 of the Tax Court's Rules of Prac-

tice. (R. 22.) The taxpayers have not printed in the record the Tax Court's opinion, which is reported at 12 T.C. 370, but for the convenience of this Court we have included it in full as Appendix "B" to this brief.

JURISDICTION

These consolidated petitions for review (R. 35, 42-44) involved federal income and victory tax for the years 1942 and 1943, deficiencies being asserted by the Commissioner as follows: (a) Estate of Ella K. McClatchy, 1942 income tax, \$8,639.98, and 1943 income and victory tax, \$1,731.25; (b) Charlotte Maloney, 1943 income and victory tax, \$213.54; and (c) Eleanor McClatchy, 1943 income and victory tax, \$2,904.43,¹ which the Tax Court confirmed under date of May 12, 1949. (R. 32-34.) Notice of the deficiencies were mailed by the Commissioner of Internal Revenue on December 11, 1946 (R. 19); and within ninety days thereafter, March 7, 1947, taxpayers filed petitions with the Tax Court for redetermination under the provisions of Section 272 of the Internal Revenue Code (R. 18). The decisions of the Tax Court were entered May 12, 1949. (R. 32-34.)

The consolidated cases are brought to this Court by taxpayers' petitions for review filed June 14, 1949 (R. 37, 42-43), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTIONS PRESENTED

1. The first issue, raised on behalf of all the taxpayers, is whether the Tax Court erred in refusing to allow deductions in the years 1942 and 1943 for payment of in-

¹ The deficiencies determined against taxpayers Charlotte Maloney and Eleanor McClatchy involve the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, Section 6.

come taxes and interest to the State of California assessed against Charles K. and Ella K. McClatchy, both deceased.

2. The second issue, raised on behalf of the Estate of Ella K. McClatchy, is whether her estate may in 1943 deduct from gross income interest on an inheritance tax deficiency assessed by the State of California in that year in connection with Ella K. McClatchy's demise.

STATUTES AND REGULATIONS INVOLVED

These will be found in Appendix "A", *infra*.

STATEMENT

The facts were stipulated and adopted by the Tax Court accordingly under Rule 30 of its Rules of Practice. (R. 22-31.) See also Appendix B, *infra*. Those found by the Tax Court as relevant to decision herein may be stated thus:

The Commissioner of Internal Revenue determined deficiencies as follows (Appendix B, *infra*):

| Petitioner | Docket No. | 1942 income tax | Income and victory tax for 1943 |
|----------------------------------|---------------|-----------------------|---------------------------------------|
| Estate of Ella K. McClatchy..... | 13214 | \$8,639.98 | \$1,731.25 |
| Charlotte Maloney..... | 13215 | | 213.54 |
| Eleanor McClatchy..... | 13216 | | 2,904.43 |

The deficiencies determined against taxpayers Charlotte Maloney and Eleanor McClatchy involved the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943, Section 6. The Ella K. McClatchy estate claims overpayment of the 1943 income and victory tax in the amount of \$1,912.12. See Appendix B, *infra*.

Taxpayers Eleanor McClatchy and Charlotte Maloney are the beneficiaries of testamentary trusts Numbers 1 and 2, respectively, of three testamentary trusts created by Charles K. McClatchy, who died April 27, 1936. Each trust received one-third of his estate. These

two taxpayers are also the executrices of the Estate of Ella K. McClatchy, who died September 23, 1939. Accordingly, they represent her estate which is the third taxpayer [petitioner] herein. The returns in question were all filed with the Collector for the First District of California, at San Francisco. (R. 23.) See Appendix B, *infra*.

The Franchise Tax Commissioner of the State of California, acting pursuant to Section 34 of the California Personal Income Tax Act of 1935, assessed additional state income taxes against Charles K. McClatchy and Ella K. McClatchy after their deaths, as follows (Appendix B, *infra*):

| Taxable period ended Dec. 31— | Date of Assessment | Additional assessment | |
|-------------------------------|--------------------|-----------------------|-------------------|
| | | Charles K. McClatchy | Ella K. McClatchy |
| 1935..... | Jan. 23, 1939 | \$1,791.64 | \$1,797.05 |
| 1936..... | Apr. 1, 1940 | 2,170.44 | 5,317.17 |
| Total..... | | 3,962.08 | 7,114.22 |

Payment of these taxes was protested and they were not paid pending an attack upon the constitutionality of Section 34 of the relevant state statute in the state courts. (R. 24, 26-27; Appendix B, *infra*.)

On March 7, 1941, the Supreme Court of California determined that Section 34 was constitutional. Payment on behalf of the two decedents was made on May 5, 1942 as follows (R. 24-25; Appendix B, *infra*):²

| Decedent | Deficiency | Interest | Paid by— | Amount |
|-------------------------|------------|------------|---------------|------------|
| Charles K. McClatchy... | \$3,932.08 | \$1,309.33 | Trust #1..... | \$1,747.14 |
| | | | Trust #2..... | 1,747.14 |
| | | | Trust #3..... | 1,747.14 |
| | | | Total..... | 5,241.42 |
| Ella K. McClatchy..... | 7,110.22 | 2,264.59 | Estate..... | 9,374.81 |

No claim for the deduction of the taxes assessed against Charles K. McClatchy and paid by the three testamentary trusts was made in that decedent's final

² Concededly the court attack was not made by any of the persons involved here. (R. 7.)

federal income tax return, filed March 15, 1937, or in that decedent's federal estate tax return, filed July 24, 1937, the tax liability with respect to which was finally settled May 14, 1940. Deductions on account of the payment of these taxes plus interest were asserted in 1942 by the parties paying them in that year, but such deductions were disallowed by the Commissioner. (R. 28, 30; Appendix B, *infra*.)

No consents or waivers were filed by either of the individual taxpayers or by the Ella K. McClatchy estate pursuant to Section 134 of the 1942 Act, or Section 126 of the Internal Revenue Code, and the appropriate Treasury Regulations. (R. 28; Appendix "B", *infra*.)

The Commissioner allowed the Estate of Ella K. McClatchy a deduction for 1942 federal income tax purposes of \$1,113.92 representing interest on the state income tax deficiency accrued after the death of Ella K. McClatchy. The deduction of the \$7,110.22 state income tax and \$1,150.67 of the total interest thereon was disallowed. (R. 7, 26; Appendix B, *infra*.)

Section 34 of the California Personal Income Tax Act was repealed in 1937. See Appendix B, *infra*.

In December, 1942, the California Tax Commission assessed additional deficiencies in state income tax against Ella K. McClatchy as follows (Appendix B, *infra*):

| Taxable Year | Tax | Interest | Total |
|--------------|----------|----------|----------|
| 1938..... | \$271.42 | \$63.85 | \$335.27 |
| 1939..... | 543.40 | 101.03 | 644.43 |
| Total..... | 814.82 | 164.88 | 979.70 |

These amounts were paid by the estate and claimed as a deduction in 1943. The Commissioner disallowed the deduction of the state income tax in the total amount of \$814.82 and \$7.22 of the interest which had accrued before the death of Ella K. McClatchy. (R. 26-27; Appendix B, *infra*.)

Ella K. McClatchy's final federal income tax return covering the year 1939 up to the time of her death was filed March 15, 1940. On October 9, 1945, the estate filed a claim for refund of income tax allegedly overpaid in the amount of \$5,788.28 for the year 1939. The refund was denied January 6, 1947. Her federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. The deductions in question were not taken in either the final income tax return or in the estate tax return. No waivers or consents were filed pursuant to Section 134 of the Revenue Act of 1942 or Section 126 of the Internal Revenue Code or the applicable Treasury Regulations. (R. 28, 30-31; Appendix B, *infra*.)

In December, 1943, additional California inheritance tax of \$5,304.41, plus interest of \$2,223.41, was assessed and paid in 1943 in connection with the Estate of Ella K. McClatchy. The beneficiaries of the Charles K. McClatchy trusts were also the beneficiaries of three trusts created by the last will of Ella K. McClatchy. The tax and interest were paid by the McClatchy newspapers and charged against the three testamentary trusts of Charles K. McClatchy. The three trusts claimed a deduction of the interest (though not the principal) in their returns for 1943, which claim was disallowed by the Commissioner. (R. 27, 30; Appendix B, *infra*.)

On June 1, 1944, the Ella K. McClatchy estate asserted that the payments were improperly made by the trusts, and accordingly the McClatchy newspapers corrected these charges on their books and showed them made against the taxpayer estate. The estate claims the interest on this inheritance tax assessment as a deduction from income for 1943; neither the Commissioner nor the Tax Court allowed any deduction in respect of this interest. (R. 27-28; Appendix B, *infra*.)

The returns in question were all filed on the cash

receipts and disbursements basis. (R. 27; Appendix B, *infra*.)

The Tax Court confirmed the Commissioner's determinations in all respects. (R. 32-34.)

SUMMARY OF ARGUMENT

1. The deduction claims here in question concern additional income taxes and interest thereon levied by the State of California in respect of Ella K. McClatchy and Charles K. McClatchy, both deceased; the assessments against Mrs. McClatchy covering the years 1935, 1936, 1938, and 1939, and those against Mr. McClatchy covering 1935 and 1936. The state law under which the 1935 and 1936 levies against these decedents were made was repealed in 1937; and, while the law was in effect, its constitutionality was challenged in the state courts by persons other than the McClatchys, resulting in a decision by the Supreme Court of California in 1941 that the statute was valid. Meantime, the levies against the two decedents for 1935 and 1936 were protested, and payment was held in abeyance awaiting the outcome of the state litigation. The state levies in respect of Mrs. McClatchy covering the years 1938 and 1939 were not even protested—they simply were not paid. No claim was made with respect of any of these taxes in either of the decedents' final federal income tax return or their respective federal estate tax returns, these being all filed prior to rendition of the decision upholding the pertinent state law.

Since payment of the state taxes in respect of Charles K. McClatchy was made by the distributees under his will who are here asserting claim to deduction therefor in the year of payment, and since it is similarly the Estate of Ella K. McClatchy who is the payor and the deduction claimant in respect to the state assessments against her, one is immediately confronted with the well-established principle of federal tax law that

the deductions granted by Congress against gross income for taxes and other deductible liabilities apply only in favor of the person against whom the particular liability is imposed. Allowance of deduction to anyone except the actual obligor is not permissible; and here not one of the payor claimants is the person against whom the state assessments were made. Accordingly, if there be no exception to the general rule which has application to this case, deduction must be *in toto* denied. We maintain that there is no applicable exception here; deduction in respect of these items should, under the law and in the circumstances, have been asserted in the respective decedents' final federal income tax returns; or possibly in the alternative, as we shall later elucidate, claim for adjustment therefor should have been made against the taxes in respect of the decedents' estates.

There is no merit to counsel's contention that the general rule above stated does not prevent the present assertion of these claims by the payors because until the validity of the California law was established in 1941 the items could not be said to have accrued for deduction purposes. The argument is based upon United States Supreme Court authority holding that a living taxpayer may not deduct a state tax, liability for which it is itself strenuously litigating in the year for which deduction is claimed. We maintain that, for reasons hereinafter elaborated, the principle upon which counsel relies cannot be expanded to cover this case; Supreme Court authority is also firmly to the effect that the internal revenue laws place a taxpayer who, as here, used the cash system of reporting during his life-time, upon the accrual basis for the last taxable period of his life. True, in 1942, Congress passed certain remedial legislation looking toward the alleviation of possible hardship engendered by the application of that rule; but such legislation had retroactive effect

only under carefully prescribed conditions set forth in the statute and in the Treasury Regulations which were authorized to be promulgated and which *were* promulgated thereunder, discussion of which later appears. And it is admitted that none of the claimants made any attempt whatever to comply with these conditions. They thus lost any chance they might have had to claim any rights they might have had themselves to claim deduction as payors in respect of these items when they paid them. And it will do claimants no greater good to assert that they need not have complied with the statutory conditions attendant upon the retro-active feature contained in the remedial legislation of 1942, than it did initially to assert that irrespective of that legislation these items could not have been deducted in the decedents' final federal income tax return because not "accrued" until the California Supreme Court handed down its decision. Counsel's reasoning in this regard is precisely the same; our answer is also the same; with the additional factor that Congress certainly had every right to name the conditions under which it granted its legislative grace; no matter what the circumstances or the possible hardship entailed, the claimants were required to hew to the line. And what we have said with respect to the principal of these state taxes applies with equal or greater force, as will be seen in our main discussion, to the interest assessments thereon except only that part of the interest which accrued in respect of Mrs. McClatchy after her death. And that the Commissioner did allow to her estate.

2. Nor is there virtue to the claim of Mrs. McClatchy's estate that it should be allowed deduction from current estate income because of payment it made for interest upon a deficiency assessment for state inheritance taxes in respect of her death. Once again, the inheritance tax was not an obligation of the

payor. The basic scheme of the California inheritance tax law is to place primary liability therefor on the distributees; the obligation of the estate is merely an administrative one. The interest logically follows the tax, and the same principle of law should accordingly govern.

ARGUMENT

I

The Tax Court Correctly Confirmed the Commissioner's Determination That under the Law and in the Circumstances the Pertinent California Income Taxes Assessed by That State in Respect of Charles K. McClatchy and Ella K. McClatchy, Both Deceased, Plus a Portion of the Interest Paid Thereon, Were Not Proper Deductions from Income for Federal Tax Purposes by Any of the Taxpayers Herein Preliminary.

Since this issue is somewhat complex on its facts, we propose as precedent to our principal legal discussion briefly to review certain salient matters. During the federal tax years here under consideration, the taxpayer, Estate of Ella K. McClatchy, was in course of administration, she having died on September 23, 1939. Prior to her death, Ella K. McClatchy was the widow of Charles K. McClatchy, he having died on April 27, 1936. See Appendix B, *infra*.

In January of 1939, which was before her death, the Franchise Tax Commissioner of the State of California levied additional state income taxes against Ella K. McClatchy for 1935, based upon the provisions of Section 34 of the California Personal Income Tax Act of 1935 (California Statutes (1935), c. 329, pp. 1122-1123), which section provided as follows:

Section 34. For the purpose of this act a personal holding company * * * shall not be recognized as a legal entity separate and distinct from the shareholders thereof. Any such company having more than one shareholder shall be deemed a partnership.

And, in April of 1940, which was after Mrs. McClatchy's death, the State Commissioner levied additional state income taxes against her under the same provision of the California law covering the year 1936. Similarly, an additional assessment was made and on the same dates in respect of Charles K. McClatchy for the years 1935 and 1936, he being deceased at the date of these levies. (R. 24; Appendix B, *infra*.)

The above quoted provision of the California income tax law was in effect only for the years 1935 and 1936, the section being repealed in 1937. *McCreery v. McColgan*, 17 Cal. 2d 555, 110 P. 2d 1051. Its constitutionality was contested in the state courts by several taxpayers, resulting in a judgment entered March 7, 1941, upholding the section's validity. *McCreery v. McColgan*, *supra*. Neither of the decedents against whom the assessments were made nor any of the taxpayers now at bar were participants in any of this litigation; it appears only that the particular assessments here in question made in respect of Ella K. McClatchy and her deceased husband were protested and that they were held in abeyance pending the outcome of the litigation in respect of the constitutionality of the section. See Appendix B, *infra*; *McCreery v. McColgan*, *supra*. In other words, it would seem that no action was taken by either the state taxing authorities or by the decedents or those representing them in respect of the matter of the liability of these decedents until after the *McCreery* decision had been handed down in 1941. Things were merely allowed to rest by all parties concerned.³

³ The 1935 additional state assessment in respect of both Charles and Ella K. McClatchy was dated January 23, 1939, and the assessments for 1936 were dated April 1, 1940. The Tax Court found that the assessments for these taxes were actually made after the death of both decedents. See Appendix B, *infra*. Cf. R. 24 and fn. 13, *infra*.

After Section 34 of the pertinent state statute was upheld, the Ella K. McClatchy estate paid the assessment against her on May 5, 1942, and deduction therefor, together with interest, was taken by the estate in its federal income tax returns for that year. Likewise, on May 5, 1942, the three testamentary trusts set up by the decedent husband paid the state income tax assessments made in respect to him and took deductions in their 1942 federal income tax returns for payment of principal and interest in *re* this state tax. In the case of both decedents, no claim whatever was made in either their final federal income tax returns or in their federal estate tax returns with respect to these items. See Appendix B, *infra*.⁴

The Commissioner refused to allow the testamentary trust payors any deduction at all in regard to the state taxes assessed in *re* Charles K. McClatchy.⁵ He also denied the Ella K. McClatchy estate deduction of anything in respect to the assessments against her for the years 1935 and 1936, except the interest on the asserted state income tax deficiencies for that period which had accrued *after* her death. The interest so accrued

⁴ The final federal income tax return of Charles K. McClatchy was filed March 15, 1937; his federal estate tax return was filed July 24, 1937, and finally settled May 14, 1940. The final federal income tax return of Ella K. McClatchy, covering the year 1939 up to the time of her death in September of that year, was filed March 15, 1940; her federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. See Appendix B, *infra*.

⁵ Accordingly, the Commissioner increased the income distributable to taxpayers Eleanor McClatchy and Charlotte Maloney, the respective beneficiaries of testamentary trusts No. 1 and No. 2 created by Charles K. McClatchy in the amount of \$1,747.14 each for the year 1942. The Charles K. McClatchy Trust No. 3 also paid a proportionate share of the state income tax deficiency in respect of its settlor, but seemingly the effect of that payment was not sufficiently consequential to the trust or to the beneficiaries thereof to warrant trust No. 3 in seriously asserting or litigating the right to federal income tax deduction therefor. See Appendix B, *infra*.

amounted to \$1,113.92, and that sum the Commissioner *did* allow to the Ella K. McClatchy estate as a deduction in 1942, the year of payment by the estate. See Appendix B, *infra*.

In December of 1942, the California Tax Commission assessed additional deficiencies in state income tax in respect of decedent Ella K. McClatchy for the years 1938 and 1939, together with interest, totalling \$979.70. Although the record does not elucidate, it is evident that these assessments were made under some section of the California Personal Income Tax Act other than Section 34, which section as we have heretofore noted was repealed in 1937.⁶ At all events, so far as this record shows, no protest was made in regard to these assessments, and they were with interest paid by the Ella K. McClatchy estate and claimed as a deduction in 1943. Once more the Commissioner disallowed any deduction therefor to the estate save the amount of interest which had accrued *after* Ella K. McClatchy's demise. See Appendix B, *infra*.

A. *No part of the principal of the state income taxes assessed in respect of either decedent was deductible by any of the taxpayers herein*

The Tax Court, in its opinion (Appendix B, *infra*) said this:

Both parties are in apparent agreement that the deductions claimed for the year 1942 on account of the payments of state income taxes assessed against the decedents, Charles K. and Ella K. McClatchy * * * must be supported by the provisions of sections 23 (w) and 126, added to the Internal Revenue Code by section 134 of the Revenue Act of 1942 [footnote omitted], since

⁶ For a sketch of the scope of the California taxing act, see again *McCreery v. McColgan*, *supra*. See also c. 329 of the 1935 California Act.

* * * [such] taxes * * * were assessed against the decedents and not against the entities which made the payments on account thereof. * * *

The "agreement" referred to in the above excerpt would appear to be real as well as apparent, for the taxpayers' argument on brief to this Court is actually merely one of confession and avoidance; they have no affirmative plea. It is clearly the general rule that the deduction granted by Congress against gross income for taxes and other deductible liabilities applies only in respect to the person against whom the obligations are imposed; "volunteers", whatever their pecuniary interest in seeing the obligation discharged and whether such interest be present or future, have no right to deduction—allowance of deduction to anyone except the actual obligor is not permissible. *Helvering v. Enright*, 312 U. S. 636; *Clough v. Commissioner*, 45 B.T.A. 97; *Burton v. Commissioner*, 37 B.T.A. 636; *Estate of Hoffman v. Commissioner*, 36 B.T.A. 972; *Perry v. Commissioner*, 32 B.T.A. 513; *Small v. Commissioner*, 27 B.T.A. 1219. In the case now at bar, the state income taxes in question were unquestionably imposed upon the two decedents; payment was made, and deduction is sought by totally different entities.⁷ Therefore if the general rule has no exception applicable to this case, the deductions must manifestly be denied these claimants. Cases cited, *supra*.⁸

So saying, let us first endeavor to dispose of the Ella K. McClatchy estate claim that it is entitled to deduction in 1942 for payments then made in respect to the

⁷ We are not speaking now of the *interest* on these state taxes. In some respects that is a different problem, and will be considered hereinafter.

⁸ We think it is not necessary to remind this Court that taxpayers are here claiming deductions which are matters of legislative grace, and only as there is clear provision therefor can any particular deduction be allowed. *New Colonial Co. v. Helvering*, 292 U. S. 435.

additional state income taxes levied against that decedent for the years 1935 and 1936 under Section 34 of the California taxing statute. Section 43 of the Internal Revenue Code (Appendix A, *infra*), in effect as of the date of Ella K. McClatchy's death in September, 1939, reads as follows:

The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, * * *. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death * * * if not otherwise properly allowable in respect of such period or a prior period.

Mrs. McClatchy, the decedent of whom we now speak, filed her returns on the cash basis (Appendix B, *infra*); and since the state taxes in question were not paid during her lifetime, it is elementary, of course, that no deduction could have been taken therefor prior to her demise regardless of whether the state imposts had "accrued" within the meaning of such cases as *United States v. Anderson*, 269 U.S. 422. The Commission's position therefore is first that deductions in respect of these items were properly to be taken in Mrs. McClatchy's last federal income tax return in accordance with the sentence in Code Section 43, above quoted, that—

In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death * * *

it having been held by the Supreme Court that the purpose of Code Section 43 (as well as Code Section

42 dealing with the reporting of income as distinguished from the taking of credits or deductions) is to place the last return of a decedent on the accrual basis of accounting even though a cash basis has been used for previous years. *Helvering v. Enright*, 312 U. S. 636, 644. In accordance with this interpretation, allowance is properly made for items such as those now under examination in the decedent's last return, regardless of payment.

However, it is the tenor of counsel's argument (Br. 9 *et seq.*) that no deduction could have been taken in respect of these state taxes in Mrs. McClatchy's final federal income tax return because they were *not* then "accrued"; that they did not "accrue" until March of 1941 when the Supreme Court of California handed down the *McCreery* decision upholding the validity of Section 34 of the basic state statute. Principal reliance for this position is on the Supreme Court's decision in *Dixie Pine Co. v. Commissioner*, 320 U. S. 516. It will be recalled that in the *Dixie Pine* case, the taxpayer who reported on the accrual basis, accrued and deducted in 1937 a state gasoline tax, although at the time it was vigorously urging in the state courts that the tax was not applicable to it. The litigation was finally decided in Dixie Pine Company's favor in 1938, and the company then reported the amount of the deduction as income of the year of decision. The Supreme Court, in holding that the taxes claimed as accrued and deducted in 1937 were not a proper deduction of that period, stated in part as follows (p. 519):

It has never been questioned that a taxpayer who accounts on the accrual basis may, and should, deduct from gross income a liability which really accrues in the taxable year. It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which

fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer. Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. *It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated.* (Italics supplied.)

Now counsel's proposition seems to be that the doctrine of *Dixie Pine* covers not only a case where the taxpayer in question is affirmatively and of itself challenging liability for the item sought as a deduction, but that it extends as well to a situation where as here (see Appendix B, *infra*), the taxpayer merely registers some kind of protest to a proposed assessment and then sits back and waits without payment or without being required to pay while the state taxing authorities and some other person or persons litigate to final determination the matter of constitutionality rather than the applicability of the statute on which liability against the taxpayer is asserted.

We do not believe that the *Dixie Pine* case carries that coverage. In the excerpt from the Supreme Court's opinion appearing, *supra*, it will be noted that Justice Roberts, speaking for the Court, emphasized that the taxpayer was itself strenuously contesting liability in the courts during the period of claimed deduction; recall too that Justice Roberts declared deduction to be permissible only in the year that the litigating taxpayer—not some *other* taxpayer or taxpayers—was finally adjudicated liable. In other words, it does not seem to us that the doctrine of the *Dixie*

Pine case permits one taxpayer to "adopt" the lawsuit of another in order to delay the accrual of an item "matured" as to it under the criteria established by *United States v. Anderson, supra*, and kindred cases. Much the same idea as here entertained by counsel, albeit in a different framing, has been rejected by the Court of Appeals for the Third Circuit. *Freihofer Baking Co. v. Commissioner*, 151 F. 2d 383.

Nor do we think the mere fact that a "protest" was made to the proposed assessment suffices to delay accrual in the circumstances of this case until 1941—the date of the California Supreme Court's *McCreery* decision—although the fact of its making does serve, we believe, to show that the proposed assessment against Mrs. McClatchy was anything but a whimsey or unfounded in law until 1941. (Cf. Br. 12-13.) Perhaps we can put the matter to test in this manner: If the *McCreery* litigation, had made demand on Mrs. State of California, instead of awaiting the outcome of McClatchy for the taxes it considered due from her, could she have placidly ignored it, relying on the pendency of the *McCreery* case? We do not think so—and we are speaking now, of course, of Mrs. McClatchy's ignoring such a demand rather than affirmatively rejecting or resisting it. Our view, in fine, is that quiescence and lethargy by the creditor and a similar state of inactivity on the part of the debtor are not attitudes which will prevent timely and proper accrual of a liability within the scope of Justice Roberts' very non-lethargic words in *Dixie Pine*.⁹

⁹ We recognize that the case of *Great Island Holding Corp. v. Commissioner*, 5 T. C. 150, might be considered Tax Court authority contrary to this position although we believe that case and this one factually distinguishable. To the extent, however, that the cases cannot be thus distinguished, we would maintain that the Tax Court's views as expressed in *Great Island Holding* are too broad.

And finally, apropos of this matter of the alleged immaturity of the liability and the alleged difficulty of taking the deduction on the decedent's final return by reason thereof, we call attention to Section 953 of the Probate Code of California which states as follows:

Section 953. Contingent, etc., claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require.

Had this statute been followed by a careful executor, the amount of the state taxes asserted for 1935 and 1936 as well as those for 1938 and 1939 would have been paid into court when Mrs. McClatchy died; and we suggest that there is every probability that in those circumstances the Commissioner of Internal Revenue would have permitted deduction therefor to be taken on the decedent's last return.

Of course, irrespective of whether the items concerned here could or should have been taken as deductions on Mrs. McClatchy's final return, the fact is that they *were* not; and we are left accordingly with our initial proposition under this heading that since the deduction claim in question is now being asserted by the estate which is not the person or entity assessed by the state taxing authorities then as the Tax Court stated (Appendix B, *infra*) the claimant must, to succeed, show that deduction is permissible under some established exception in the law; and it seems to us clear that the only possible exception lies in the additions to the Code made by Section 134 of the Revenue Act of 1942, c. 619, 56 Stat. 798,

the pertinent provisions of which are for the convenience of the Court set forth in the margin at this point in our discussion.¹⁰ As we have heretofore stated, prior to 1942 income and deduction items accrued to the date

¹⁰ SEC. 134. INCOME IN RESPECT OF DECEDENTS.

(a) *General Rule.*—The last sentence of section 42 (a) (relating to inclusion in gross income of amounts accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death."

(b) *Deductions and Credits.*—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

(c) *Cross Reference.*—Section 22 (relating to definition of gross income) is amended by inserting at the end thereof the following:

"(1) *Income of Decedents.*—For inclusion in gross income of certain amounts which constituted gross income in respect of a decedent, see section 126."

(d) *Deductions of Estate.*—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

"(w) *Deductions of Estate, Etc., on Account of Decedent's Deductions.*—

"(1) In the case of a person described in section 126 (b), the amount of the deductions in respect of a decedent to the extent allowed by such subsection.

"(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c)."

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

"SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * *

"(b) *Allowance of Deductions and Credit.*—The amount of any deduction specified in section 23 (a), (b), (c), or (m) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credits), in respect of a decedent which is not properly allowable to the decedent in respect of a

of a taxpayer's death were required to be included in the return for his last taxable year. *Helvering v. Enright*, *supra*; *Pfaff v. Commissioner*, 312 U. S. 646; *Estate of Putnam v. Commissioner*, 324 U. S. 393. In order to alleviate certain obvious hardships resultant on that rule, Congress amended the Code—the net effect of Section 134 of the Revenue Act of 1942, the amendment, being in general that deceased cash basis taxpayers were no longer placed upon the accrual basis for the last taxable period of their lives. *Larkin's Estate v. Commissioner*, 167 F. 2d 115 (C. A. 2d). See also H. Rep. No. 2333, 77th Cong., 2d Sess. p. 84 (1942-2 Cum. Bull. 372, 436); S. Rep. No. 1631, 77th Cong., 2d

taxable period in which falls the date of his death, or a prior period, shall be allowed:

“(1) *Expenses, interest, and taxes.*—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

“(A) to the estate of the decedent; except that

“(B) if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.

* * * * *

(f) *Effective Date of Amendments.*—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) *Taxable Years Before 1943.*—In case the taxable period in which falls the date of the death of the decedent began after December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of sections 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, which ever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross

Sess., pp. 100-105 (1942-2 Cum. Bull. 504, 579-583).¹¹ As seen from footnote 10 foregoing, Section 134 added to the Code Section 126, subsection (b) of which relates to deductions and credits, including taxes, in respect of a decedent that are not allowable for the taxable period in which fall the date of death or a prior period. Such deductions and credits are under the new law allowable to the estate or, if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, then allowance is made to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.

income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts, the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

(26 U.S.C. 1946 ed., Secs. 22, 23, 42, 43, 126.)

¹¹ In fact, even accrual basis taxpayers by virtue of a new sentence added to Section 42 (a) were not required to include amounts "accrued only by reason of the death of the taxpayer". See Revenue Act of 1942, Section 134 (a).

The parts of Section 134 vital to disposition of this case are subsections (f) and (g). Subsection (f) states that the provisions of the statute relating to amounts of income, credit, and deduction items accrued up to death of the taxpayer shall be applicable with respect to tax years beginning after December 31, 1942. Obviously, that effective date would not encompass this case. However, under subsection (g), Congress permitted retroactivity as follows:

(g) *Taxable Years Before 1943.* In case the taxable period in which falls the date of the death of the decedent began after December 31, 1939, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of section 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue, which ever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period.

But most importantly here, subsection (g) of Section 134, next continues:

*The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consent made under oath by the fiduciary representing the estate and by each such person * * * that with respect to such amounts the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death.* (Italics supplied.)

In short, Congress has strictly and explicitly conditioned retroactive applicability of these amendments, as to the period before 1943, by requiring the filing of signed consents in the precise manner and of the exact content by the persons specified, all as set forth in the statute and the concomitant Regulations which the statute authorizes the Commissioner to prescribe. If the conditions required by Section 134 (g) and the Regulations which the Commissioner has promulgated thereunder with respect to these consents are not met, then the rule of the *Enright* case yet obtains as to tax periods prior to 1943; absent fulfillment of the conditions as to the very letter, the new amendments carry no retroactivity. *Larkin's Estate v. Commissioner*, 167 F. 2d 115 (C. A. 2d), *supra*; *Estate of Ingraham v. Commissioner*, 8 T. C. 701.

It is admitted here that no consents of any kind or description were filed in accordance with either statute

or Regulations.¹² (R. 28.) But counsel counters this by asserting (Br. 12-13) that in the circumstances consent was not required since the final federal income tax of Ella K. McClatchy was filed on March 15, 1940, about a year prior to the determination that the state tax was constitutional; by reason of the alleged delayed accrual of these state taxes, it is asserted (Br. 12), there was nothing to waive until the taxes did accrue—in short, the *Dixie Pine* doctrine again. Earlier in this brief we have set forth at some length our reasons for believing that the principle enunciated by the Supreme Court in the *Dixie Pine* case cannot be applied to the facts of this one so as to defer proper accrual of the state tax in question until the California Supreme Court had set at rest the validity of the pertinent statute; we have also put forward the suggestion that deduction would probably have been allowed in the decedent's final federal income tax return had the amount of the proposed deficiency been paid into court pursuant to the provision of the California Probate Code hereinbefore set forth, on the assumption here made in this connection *arguendo* that until the outcome of the *McCreery* litigation, Mrs. McClatchy's liability *was* a contingent one. Our argument in respect of those matters is equally germane, we think, in response to this of counsel's contention that there was really nothing to waive or to which to consent under Section 134 (g) of the Revenue Act of 1942 until the *McCreery* case was decided. We see nothing to add to our argument at this juncture apropos of these points.¹³

¹² The appropriate Treasury Regulations are Section 29.126-4 of Regulations 111. See Appendix A, *infra*.

¹³ Except that perhaps we should call the Court's attention to an apparent discrepancy between the stipulation of facts and the findings of the court below. The Tax Court found (Appendix B, *infra*) that the additional state income tax assessments for both 1935 and 1936 and in respect of both decedents were made after

And, in any event, whether or not we are correct in asserting that the *Dixie Pine* case will not support counsel's theses, we think unanswerable the Commissioner's position, and the Tax Court's concurrence therein (Appendix B, *infra*), that the clear and unambiguous language of Section 134 (g) of the Revenue Act of 1942 does demand that consents be filed precisely as the statute and the Regulations declare. The law is precise and plain of terminology; there is no warrant whatever for enlarging its meaning by construction, or for making exceptions to its terms irrespective of possible hardship. Section 134, though a relief measure, is clearly a grant of grace. Cf. *Deputy v. duPont*, 308 U. S. 488; *Taft v. Commissioner*, 304 U. S. 351; *Estate of Ingraham v. Commissioner*, *supra*; *Journal Publishing Co. v. Commissioner*, 3 T. C. 518.

We have already referred to the case of *Larkin's Estate v. Commissioner*, 167 F. 2d 115 (C. A. 2d). The Court of Appeals there held that a consent to comply with the terms of Section 134 (g), which authorizes the estates of persons dying before the effective date of that Act, by filing a consent to have income "accrued" at the time of death only by reason of death (*Helvering v. Enright*, *supra*), taxed when received as provided by the 1942 Act, which consent was filed only by the executor but not by the trustees of the residuary estate nor by the residuary legatees does not meet the statutory requirements. It was there argued by the taxpayer estate that the executors who signed the consent had since paid the tax upon all the accruals existing at the time of decedent's death as they realized the cash pay-

their deaths; the stipulation of facts (R. 24) recites that the additional assessment for the year 1935 against Ella K. McClatchy was made during her lifetime.

Also, the record fails to show whether the protests against these assessments were timely filed and whether content of the protests met the requirements of the state statute. See California Statutes (1935), c. 329, Sec. 19, pp. 1112-1113.

ments represented by these accrued items, and since the legatees and trustees did not themselves directly receive the taxable income, consents by them to pay taxes were unnecessary and could not be regarded as required within the purpose of the statute. The Court of Appeals answered that consents *were* plainly required from the trustees and legatees by the Regulations, and by Section 134(g) in terms; the court's opinion referred to the evident intention of Congress to grant retroactive relief against the *Enright* rule as to all open years only under proper safeguards insuring payment of the tax by the recipients of income in such years;¹⁴ and in conclusion the Second Circuit said in *Larkin* (p. 116):

In any event, diminution of taxes or partial exemption from taxes realized through application of this Act was a privilege afforded by Congress and a taxpayer must bring himself within the strict terms required for the election in order to secure its benefits.

We have likewise already made mention of the Tax Court's decision in *Estate of Ingraham v. Commissioner*, 8 T. C. 701. There it was held that an informal letter of consent sent by the estate executor to the Collector instead of to the Commissioner which did not comply in form or content with the Regulations promulgated under Section 134 (g), and the complete failure of the residuary legatees under the will timely to file any kind

¹⁴ See, apropos of this, the remarks of Mr. Randolph Paul in 1942, then tax advisor to the Secretary of the Treasury, in hearings held by the Committee on Ways and Means with respect to revenue law revision. 1 House Hearings Before the Committee on Ways and Means, Revenue Revision of 1942, p. 89. See also the Report of the Ways and Means Committee recommending the amendments which became Section 134 of the Revenue Act of 1934. H. Rep. No. 2333, 77th Cong., 2d Sess. p. 84 (1942-2 Cum. Bull. 372, 436). See also S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 100-105 (1942-2 Cum. Bull. 504).

of consent, made mandatory inclusion in decedent's last return of income accrued to the date of his death. In the *Ingraham* case, it was contended *inter alia* that the residuary legatees were not obliged to file consents because as charitable, educational, or religious organizations, they were exempt under Code Section 101 (26 U.S.C. 1946, ed., Sec. 101). Answering this argument, the Tax Court said (p. 705) :

Both the petitioner, as executor, and the beneficiaries must comply with the law; this they have not done. We do not think there is any merit in petitioner's contention that, since the residuary legatees were tax exempt, they were therefore not required to comply with section 134 (g). Neither the law nor the regulations exempt tax-exempt corporations from compliance.

One need but look at the Regulations promulgated under authority of Section 134 (g) to see how carefully is conditioned the relief afforded by the retroactive feature of the new law. For instance, in addition to the specific requirements made by Section 134 (g) itself, Section 29.126-4 of Treasury Regulations 111, *inter alia*, provides that all consents with respect to any one decedent shall be filed at the same time with the Commissioner of Internal Revenue at Washington, D. C. The Regulations provide further that the consents must be filed not later than one year after the time prescribed for filing the return for the last taxable year of the decedent (not including any extension of time for such filing) or January 1, 1944, whichever is later. Additionally, the Regulations require that accompanying the consents there must be submitted under oath statements containing certain elaborately specified information.

If such stringency seems perhaps unduly harsh in the peculiar circumstances of a given case, then we

answer that federal tax law is replete with such. A familiar leading case is, for instance, *Riley Co. v. Commissioner*, 311 U. S. 55, in which the Supreme Court held that in the computation of net income in the case of mines, Section 114 (b)(4) of the Revenue Act of 1934, which permitted deductions for depletion on a percentage basis, provided that the taxpayer in making his "first return" under the Act should there elect to avail himself of that basis, was not satisfied by the filing of an amended return after the expiration of the statutory period for filing the originals.¹⁵ Another example to the same effect is the decision in *Scaife v. Commissioner*, 314 U. S. 459, a capital stock declaration of value case, where the election was the result of a mistake. Still another well known authority is *Mother Lode Co. v. Commissioner*, 317 U.S. 222, 227, where, as in the *Scaife* case, the Supreme Court said that the congressional grant relied upon by the taxpayer was "a liberal offer limited to those who meet the exact statutory terms." This Court, in *Degnan v. Commissioner*, 136 F. 2d 891, certiorari denied, 320 U.S. 778, recognized the principle we are now propounding when it refused to recognize a delinquent return making an election for percentage depletion as a "first return" within the meaning of Section 114 (b)(4) of the Revenue Act of 1938, c. 289, 52 Stat. 447, even though such delinquent return was in fact the first one which the taxpayer Degnan had made.

And, even if we are not correct in the foregoing part of our argument, still no weight can be given to the

¹⁵ In response to the taxpayer's plea in *Riley v. Commissioner*, *supra*, that it had no actual knowledge of the opportunity to elect percentage basis depletion and that equitable considerations should therefore govern, the Supreme Court said (p. 59):

That may be the basis for an appeal to Congress in amelioration of the strictness of that section. But it is no ground for relief by the courts from the rigors of the statutory choice which Congress has provided.

claim of the Ella K. McClatchy Estate that it is entitled to deduct the principal of the state tax deficiency assessed in respect to decedent Ella H. McClatchy for 1938 and 1939, paid by the estate in 1943. (Appendix B, *infra*.) The record does not contain one word of protest in respect of this; much less again is there evidence that any consents or waivers were filed anent Section 134 (g) of the Revenue Act of 1942. All that the taxpayer estate or anyone can say is that it voluntarily paid the assessment in May and June of 1943, once more a volunteer. *Ergo, Dixie Pine* can have no application whatever—even if we assume that it has application anywhere in this case. See *Commissioner v. United States Trust Co.*, 143 F. 2d 243 (C.A. 2d), certiorari denied, 323 U.S. 727.

The husband of Ella K. McClatchy, Charles K. McClatchy, died earlier than she did, his death having occurred in April of 1936. (Appendix B, *infra*.) Thus, although the additional state tax asserted against him covered the years 1935 and 1936, the date of the assessments therefor succeeded his death (Appendix B, *infra*), and, unlike the case of his widow, Mr. McClatchy's estate at times pertinent had been distributed to three testamentary trusts, and it is accordingly the beneficiaries of two of those trusts who claim federal income tax deduction for 1942, the year in which payment of the state assessment against Charles K. McClatchy was made (Appendix B, *infra*). The Tax Court opinion states that protest of the taxes against Mr. McClatchy was also made and that payment was withheld pending the determination in 1941 of the constitutionality of Section 34 of the California Personal Income Tax Act of 1935. (Appendix B, *infra*.)¹⁶ In the

¹⁶ There is nothing to show in the case of either decedent whether or not these protests were made in due conformity with the California law. See California Statutes, c. 329, Sec. 19, p. 1112.

interim, both his final federal income tax return and his estate tax return had been filed without any mention whatever of these items—the first being filed on March 15, 1937, and the second having been finally settled on May 14, 1940. (Appendix B, *infra*.) And likewise as in the case of his widow, no consents or waivers of any kind have ever been filed by the tax payors pursuant to Congress' requirement set forth in Section 134 (g) of the Revenue Act of 1942.

So, in respect to Charles K. McClatchy, we have approximately the same situation as pertains in the case of Ella K. McClatchy so far as the state taxes for the years 1935 and 1936 are concerned—saving, for whatever it may at this juncture be worth, the fact that as to the widow, the assessment for the 1936 levy was dated prior to her death in September of 1939. (Appendix B, *infra*.)¹⁷ We have the same situation with respect to the claim of Mr. McClatchy's trust beneficiaries who paid the state tax levied against him for 1935 and 1936 as we do with respect to Mrs. McClatchy's estate who paid the state tax for these years on her behalf—the doctrine of the *Dixie Pine* case did not obviate the necessity for the filing of Section 134 (g) consents by the appropriate parties in either case. *Larkin's Estate v. Commissioner, supra*.

The Tax Court, although mentioning the filing dates of the federal estate tax return of both decedents and that nothing was mentioned therein about any of these items, makes no point of the matter. (Appendix B, *infra*.) However, counsel's brief asserts (Br. 12-13) that since, as he says, the state taxes in question had not accrued in respect of either decedent on account of the *Dixie Pine* principle, none of the taxpayers were en-

¹⁷ Of course, as earlier we have stated, Section 134 (g) of the Revenue Act of 1942, places an estate and a taker by inheritance in the same category. See *Ardenghi v. Helvering*, 100 F. 2d 406 (C. A. 2d), certiorari denied, 307 U. S. 622.

titled to any rights in respect of federal estate taxes. Let us examine this proposition. Code Section 812 (26 U.S.C. 1946 ed., Sec. 812), in defining the net estate of a decedent, states *inter alia* in subsection (b) that deduction from gross is allowable for taxes and for claims against the estate; Section 81.37 of Treasury Regulations 105 specifically declares not deductible from gross estate unpaid taxes upon income received after death.¹⁸ And again, Section 81.29 of Treasury Regulations 105 provides in respect of deduction for administrative expenses and claims, etc., as follows:

An item may be entered on the return for deduction though the exact amount thereof is not then known, provided it is ascertainable with reasonable certainty, and will be paid. No deduction may be taken upon the basis of a vague or uncertain estimate. In the event the amount of the liability was unascertainable at the time of final audit of the return by the Commissioner, and, as a consequence, deduction was not allowed therefor in such audit, and subsequently the amount of the liability is ascertained, relief may be sought as provided by
* * * 81.96.

Section 81.96 of Treasury Regulations 105, referred to, *supra*, deals with claims for refund, and provides so far as here material that—

Claims for the refund of estate tax imposed by the Internal Revenue Code must be filed within three years next after the payment of the amount sought to be refunded.

Section 11.19 of 1 Paul, Federal Estate and Gift Taxation, contains the following statement—

To be allowable as a deduction it is not necessary that a claim be matured at the time of the decedent's

¹⁸ This section of the Regulations further states that no estate, succession, legacy, or inheritance tax is deductible.

death. It may mature during the administration of the estate, or even after the estate is settled and the executors are discharged.

It will be recalled that the federal estate tax return of Charles K. McClatchy was filed July 24, 1937, and finally settled May 14, 1940 (Appendix B, *infra*); that of Ella K. McClatchy was filed December 20, 1940, and finally settled June 11, 1942. The pertinent California taxing law was passed in 1935; it was of course *prima facie* valid, and—assuming that the final settlement date of the husband's federal estate tax liability would govern—even the amount of the respective decedents' liability for the 1935 and 1936 state income tax, provided the state law were to be adjudged constitutional, was ascertainable, all in ample time for their representatives to have called this matter to the attention of the Commissioner during the dealings in respect of the settlement of the taxes on the decedents' estates.¹⁹ But apparently the decedents' representatives "slept on their rights"; and in line with our previous suggestion that the amounts of the purported liabilities could have been paid into the state court under the section of the California Probate Code we have quoted,²⁰ we put forward now the thought that the decedents' representatives, understanding as they must have done the distinct possibility that the California law imposing the tax would be sustained, should have traversed each and every likely avenue looking toward tax reduction. Of course, we are not suggesting that there was any right here to "double" deduction.

¹⁹ Manifestly, what we say here applies *a fortiori* to the state income taxes levied against Mrs. McClatchy covering the years 1938 and 1939.

²⁰ That suggestion was made in our discussion of the final income tax return of Ella K. McClatchy, but it could apply as well at this point, we submit, with respect to course of administration proceedings *re* both Charles and Ella McClatchy.

The argument we now are making is one only in the alternative.

And at the very least—if we consider these state taxes so “immature” that they could not have been claimed in the original returns or considered in conference with a view to postponement of final settlement of estate tax until the *McCreery* litigation came to an end—then we maintain that certainly as to Ella K. McClatchy, who died in September of 1939, the estate had more than sufficient time to file a claim for refund as the Regulations quoted, *supra*, in part provide; the *McCreery* decision came down in March of 1941, and whatever uncertainty or “immaturity” there may *arguendo* have been theretofore as respects the matter at hand, was once and for all then at an end.²¹

B. *No part of the interest on the state income taxes assessed in respect of either decedent was deductible by any of the taxpayers herein, except the amounts which the Commissioner allowed the Ella K. McClatchy Estate as representing that part of the interest on the state tax deficiencies accruing after her death*

As will be evident to this Court, most of what we have said in the foregoing subheading “A” of this argument applies here with equal force. Again, liability for interest must be that of the taxpayer. See Section 23 (b) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 23); *Central Bank of Cleveland v. Commissioner*, 35 B.T.A. 489; 4 Mertens, Law of Federal

²¹ Perhaps this is as good a place as any in our discussion to mention counsel's plea (Br. 14-15) that this is a hardship case and therefore relief should be granted under Code Section 3801 (26 U.S.C. 1946 ed., Sec. 3801). That section is a rather complicated adjustment law directed primarily at the rigors of the statute of limitations. Counsel points to no provision thereof which is or might be applicable to any of the facets of the instant case, and we can ourselves discover none.

Income Taxation, Sec. 26.03. Like the state taxes themselves, the amounts of interest claimed as deductible by these taxpayers and disallowed were not obligations imposed upon *them*; certainly the trust beneficiaries paid strictly as volunteers.²² As for the executrices of the Ella K. McClatchy Estate, they are fiduciaries and have a liability as such, but that liability obviously is not the kind with respect to deduction encompassed in the rule of, for example, *Perry v. Commissioner*, *supra*; 4 Mertens, Law of Federal Income Taxation, Sec. 26.03, *supra*. Perhaps we can liken the executrices here to transferees (although admittedly they do not fall within the definition of a transferee as found in Section 311 (a) (1) (f) of the Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 311)), for if they were to pay out estate monies to the detriment of the Government they would undoubtedly be personally liable under Section 3467 of the Revised Statutes (31 U.S.C. 1946 ed., Sec. 192) and be subject under Section 311 (a) (2) of the Code to the same provisions as are transferees.

The Tax Court and the Court of Appeals for the Third Circuit once held that transferees may deduct interest accrued subsequent to date of transfer of assets upon taxes of the transferor paid by the transferee but may not deduct interest paid prior to the transfer. The Third Circuit cases are both affirmances of the Tax Court; they are *Commissioner v. Breyer* and *Commissioner v. Koppers Co.*, reported as one at 151 F. 2d 267. The subject matter of the *Koppers* case was interest on income taxes of the transferor; the *Breyer* case involved interest on estate taxes of the estate. Three Courts of Appeals, reversing decisions of the Tax Court, have held that a transferee may not deduct

²² Interest accrued on the state tax deficiencies here in question were disallowed as deductions accordingly except as stated in the heading hereof. See Appendix B, *infra*.

interest accrued either prior to or subsequent to the transfer upon debts of the transferor paid by the transferee. *Commissioner v. Henderson's Estate*, 147 F. 2d 619 (C.A. 5th); *Nunan v. Green*, 146 F. 2d 352 (C.A. 8th); *Commissioner v. Green*, 148 F. 2d 157 (C.A. 9th). Accordingly, if we liken Mrs. McClatchy's estate to a transferee, it has had better than the treatment allowed by the three Courts of Appeals last referred to, for as heretofore noted, only the interest accrued to date of her death has been disallowed. See Appendix B, *infra*.²³

II

The Tax Court Correctly Confirmed the Commissioner's Determination That No Deduction Was Allowable from Income of Ella K. McClatchy's Estate for Interest Upon a Deficiency Assessed in Respect of State Inheritance Taxes

At the risk of seemingly endless repetition, we assert again that the interest now in question was not deductible by the estate because the taxes to which the interest was incident were not obligations of the estate. The inheritance tax law of California does not place the basic liability for payment of the tax upon the estate, as does the federal estate tax law (*Y.M.C.A. v. Davis*, 264 U. S. 47); it places it upon the distributees. The California law is a succession tax, as distinguished from a death duty, being based upon the right to *acquire* rather than on the privilege in the decedent to determine to whom the property shall pass. The California rates depend upon the degree of relationship, if any, between decedent and distributee—the rate being less for amounts distributed to those bearing close family relationship to the decedent than to more distant relatives or others. See *Estate of Kennedy*, 157

²³ The cases of *Commissioner v. Green*, *supra*, and *Nunan v. Green*, *supra*, both reiterate the principle that the interest obligation must be that of the taxpayer. 4 Mertens, Sec. 26.03, *supra*. One taxable entity cannot take deduction for the liability of another.

Cal. 517, 108 Pac. 280; *In re Belville's Estate*, 152 P. 2d 229; *Cohn v. Cohn*, 20 Cal. 2d 65, 123 P. 2d 833. Cf. *Knowlton v. Moore*, 178 U. S. 41; *Hill v. Commissioner*, 37 B.T.A. 782.

We quote from the *Cohn* case, *supra*, as follows (123 Pac. 2d 833, 834-835):

Generally speaking, the state [California] assesses the privilege of succeeding to property, and computes the tax upon the interests of the legatees or devisees and the degree of relationship, if any, to the decedent. * * * The tax is not one of the expenses of administration or a charge upon the general estate of the decedent; it is collectible out of each specific share or interest to which the beneficiary succeeds and not from the general property of the estate * * * Under the Inheritance Tax Act of 1921 * * *,²⁴ which was in effect at the date of Charles Cohn's death, the inheritance tax constitutes a lien upon the property passed or transferred, and executors and administrators are liable for it. By section 9 of the Act, any executor or administrator having in charge any legacy or property for distribution, is directed to deduct the tax therefrom, or, if the property be not money, he is directed to collect the tax thereon from the legatee. * * * However, the fact that the executor or administrator must pay the tax and is authorized to deduct the amount assessed against the distributive share of each person inheriting or succeeding to the estate does not change the nature of the tax as one upon the right to inherit. The provisions concerning collection of the tax are administrative in character; they do not fix the liability for it upon the estate. * * *

At first blush, all of this discussion anent the character of the California tax now being considered is

²⁴ Which is in material substance the equivalent of the statute under which the inheritance taxes here in question were assessed. See Act 8495 of the General Laws of California (1939).

gratuitous, for Code Section 23 (c) expressly prohibits deduction from income of either estate or inheritance taxes. However, neither statute nor Regulations covers the matter of deduction of *interest* on such taxes, which is the problem confronting us. It would therefore appear that we must needs resort to our fundamental question: Whether this interest was or was not a debt of the claimant estate;²⁵ and in that light, our foregoing argument is pertinent we think, for the above-cited authorities make it clear beyond peradventure that since this interest was allied with a particular debt, i.e., the California inheritance taxes, its payment was due not from Mrs. McClatchy's estate but from the distributees under her will.²⁶

Our point, in fine, is that the interest here disallowed, being an incident of the debt (the state inheritance tax) follows the principal obligation accordingly. It therefore cannot on any score be a proper deduction from current income of the estate as is claimed. In *Jones v. Hassett*, 45 F. Supp. 195 (Mass.) it was held that Code Section 23 (b) and its antecedent equivalents permit a deduction for interest on indebtedness only when the interest arises from a debt owed by the tax-

²⁵ It will be recalled that the inheritance taxes in re Mrs. McClatchy, together with interest, were actually paid by McClatchy Newspapers and charged against the three testamentary trusts created by Charles K. McClatchy. The trusts claimed a deduction of the interest in their 1943 returns, which was disallowed by the Commissioner. In 1944, Mrs. McClatchy's estate contended that payment was improperly made by the Charles K. McClatchy trusts, whereupon the newspapers corrected these charges on their books and showed them made against Mrs. McClatchy's estate. This change of front appears to have satisfied the Commissioner sufficiently so that he regarded the estate as the payor, though it does not seem to have satisfied the Tax Court that the estate did pay this interest in 1943, the year of its claim. See Appendix B, *infra*.

²⁶ There is nothing in the record to indicate whether, or to what extent, distribution of Mrs. McClatchy's estate had been effected at the time payment of the interest on these inheritance taxes was made.

payer claiming the right of deduction. See also *Sulzberger v. Commissioner*, 33 B.T.A. 1093; *Holden v. Commissioner*, 27 B.T.A. 530. The liability of an executor or administrator for interest on the type of inheritance taxes here involved due in respect of their decedent is merely, we repeat, an administrative obligation, just as is the principal of the obligation itself.

CONCLUSION

The decisions of the Tax Court should be affirmed as to all of the taxpayers and on all of the issues.

Respectfully submitted,

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DECEMBER 1949.

APPENDIX A

Internal Revenue Code:

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits (other than the corporation dividends paid credit provided in section 27) provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death (except deductions under section 23 (o), if not otherwise properly allowable in respect of such period or a prior period.

(26 U.S.C. 1946 ed., Sec. 43.)

Revenue Act of 1942, c. 619, 56 Stat. 798:

SEC. 134. INCOME IN RESPECT OF DECEDENTS.

* * * * *

(b) *Deductions and Credits*.—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

* * * * *

(d) *Deductions of Estate*.—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

“(w) *Deductions of Estate, Etc., on Account of Decedent’s Deductions*.—

“(1) In the case of a person described in section 126 (b), the amount of the deductions in respect of a decedent to the extent allowed by such subsection.

“(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c).”

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

“SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * *

“(b) *Allowance of Deductions and Credit*.—The amount of any deduction specified in section 23 (a), (b), (c), or (m) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credits), in respect of a decedent which is not properly allowable to the decedent in respect of a taxable period in which falls the date of his death, or a prior period, shall be allowed:

“(1) *Expenses, interest, and taxes*.—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

“(A) to the estate of the decedent; except that

“(B) If the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent.”

* * * * *

(f) *Effective Date of Amendments.*—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) *Taxable Years Before 1943.*—In case the taxable period in which falls the date of the death of the decedent began after December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of sections 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, whichever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed

consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts, the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the death of the decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

(26 U.S.C. 1946 ed., Secs. 22, 23, 42, 43, 126.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.126-4. *Income in Respect of Decedent Dying in Taxable Year Beginning Before 1943; Tax of Decedent.*—

* * * * *

(b) *Consents; tax of estate and persons filing consents.*—For the purposes of the election provided by section 134(g) of the Revenue Act of 1942, the consents must be filed by the fiduciary of the estate and by each person who received any right to income in respect of the decedent by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent. Ordinarily, the persons who must file such consents are the administrator or the executor of the estate, the residuary beneficiary of the estate, the trustees and beneficiaries of any trust the corpus of which includes such right to income, every other specific beneficiary of such right, and every person who receives any such right to survivorship, such as the surviving joint tenants of any right to income held in joint tenancy and the surviving coowners or beneficiaries of any defense bonds owned by the decedent on which there is accrued interest not includible in his gross income under his method of ac-

counting. If any such person is not in existence or is under legal disability, the consent may be made by his legal representative.

All of such consents with respect to any one decedent shall be filed at the same time with the Commissioner of Internal Revenue, Washington, D. C. The consents must be filed not later than one year after the time prescribed for filing the return for the last taxable year of the decedent (not including any extension of time for such filing) or January 1, 1944, whichever is later.

The executor, administrator, or other fiduciary of the estate (or if there is no such fiduciary, the principal beneficiary of the estate) must submit, under oath, a statement accompanying the consents and containing the following information:

* * * * *

(3) A list of all the items, allowed as deductions and credits in computing the net income of the decedent for his last taxable year, which would not be allowable as deductions and credits if the amendments made by section 134 (b) of the Revenue Act of 1942 were applicable to the revenue law in effect for such taxable year. See section 29.43-1.

(4) The amount allowable as a deduction or credit with respect to each such item listed in (3), the aggregate of such amounts, the amount of the deductions for estate tax purposes from the gross estate of the decedent in respect of claims which are founded upon that portion of such items as are described in section 126 (b), and the aggregate of such deductions.

* * * * *

(6) The names and addresses of every person entitled by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent to receive any property subject to an obligation of the decedent for which a deduction or credit described in section 29.126-2 is allowable.

Each consent shall be made under oath and shall contain the following:

(A) The name and address of the person filing the consent, and the collection district in which he files his return.

(B) The name and address of the decedent, the date of his death, the period covered by his last income tax return, and the collection district in which such return was filed.

* * * * *

(D) A list of all the items in respect of the decedent for which such person may claim deductions and credits described in section 29.126-2, showing the face value of such items, the property received by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent subject to the obligation for which any such deduction is allowed, and, if any such obligation has been paid, the amount and date paid.

(E) A recomputation of the net income and of the tax of the person filing the consent, made (i) for each taxable year in which any item described in (C) was collected, or in which the right to any such item was transferred to a person not entitled to such right by bequest, devise, or inheritance from the decedent or by reason of the death of the decedent, (ii) for each taxable year in which any item listed in (D) was paid, or would otherwise be allowed as a deduction or credit under section 29.126-2, and (iii) for each taxable year in which there is a carry-over or carry-back of any item from any taxable year described in clauses (i) and (ii). Such recomputation shall be made under the provisions of sections 29.126-1, 29.126-2, and 29.126-3 by including in gross income the income in respect be allowed as a deduction or credit under section 126 (a) and by allowing as deductions and credits the deductions and credits which are allowable under section 126 (b) and (c) when section 126 is made applicable to such taxable year and when the

amendments made by section 134 (a) and (b) of the Revenue Act of 1942 are made applicable to the law in effect for the last taxable year of the decedent (see sections 29.42-1 and 29.43-1). This recomputation shall be made only for taxable years the returns for which were due prior to the date and consent is filed. The increase or decrease in tax for each such taxable year as a result of such recomputation shall be shown, as well as the aggregate of such increases and the aggregate of such decreases.

(F) An unqualified statement by the person filing the consent agreeing that his tax for each taxable year ending on or after the date the decedent died and the tax of the decedent for his last taxable year shall be computed under the provisions of section 134 (g) of the Revenue Act of 1942.

* * * * *

APPENDIX B

THE TAX COURT OF THE UNITED STATES

ESTATE OF ELLA K. McCLATCHY, ELEANOR McCLATCHY
AND CHARLOTTE MALONEY, EXECUTRICES, PETITIONERS
v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

CHARLOTTE MALONEY, PETITIONER,
v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ELEANOR McCLATCHY, PETITIONER,
v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket Nos. 13214, 13215, 13216. Promulgated
March 18, 1949.

In 1942 testamentary trusts and/or the estate of decedents paid state income taxes assessed against decedents covering periods before their deaths,

together with interest thereon. These taxes were not paid before 1942 because of a contention that the state law imposing the taxes was unconstitutional. No consents were filed as required by section 134 (g) of the Revenue Act of 1942. Deductions were claimed for the year 1942 on account of such payments in that year. *Held*, such deductions were not available under the provisions of section 134, Revenue Act of 1942; *held, further*, interest on inheritance taxes paid to the State of California by the estate of a decedent was not interest on an obligation of the estate, and the estate may not deduct such payment from gross income under section 23 (b), Internal Revenue Code.

John J. Hamlyn, Esq., for the petitioner.

A. J. Hurley, Esq., for the respondent.

KERN, Judge: In these proceedings, consolidated for hearing and opinion, the Commissioner determined deficiencies as follows:

| Petitioner | Docket No. | 1942 income tax | Income and victory tax for 1943 |
|----------------------------------|---------------|-----------------------|---------------------------------------|
| Estate of Ella K. McClatchy..... | 13214 | \$8,639.98 | \$1,731.25 |
| Charlotte Maloney..... | 13215 | | 213.54 |
| Eleanor McClatchy..... | 13216 | | 2,904.43 |

The deficiencies determined against petitioners Charlotte Maloney and Eleanor McClatchy involve the year 1942 by virtue of the provisions of the Current Tax Payment Act of 1943. The estate of Ella K. McClatchy claims overpayment of the 1943 income and victory tax in the amount of \$1,912.12.

The first issue, raised on behalf of all petitioners, is whether deductions may be taken in the year 1942 for payment of income taxes to the State of California assessed against Charles K. and Ella K. McClatchy, both deceased.

The second issue, raised on behalf of the estate of Ella K. McClatchy, is whether the estate may deduct from gross income interest on an inheritance tax deficiency assessed by the State of California.

An issue involving receipt of dividends by petitioners has been abandoned.

It is stipulated that in the determination of deficiency respondent did not give the estate of Ella K. McClatchy credit for the payment in February 1947 of additional income taxes, computed on items not here in issue, in the amount of \$1,669.93 for the year 1942, and additional income and victory taxes in the amount of \$1,064.50 for the year 1943, together with interest in the respective amounts of \$362.05 and \$166.92. Similarly, the respondent in his answer admits that petitioner Eleanor McClatchy received in January 1947 "a demand from the collector at San Francisco for 1943 tax due and payable in the amount of \$2,546.52. This demand (plus interest of \$399.31) was paid in February 1947." Respondent makes no reference to these matters in his brief. We understand that the issues raised by petitioners in connection therewith are conceded by respondent.

The facts were stipulated and the proceedings were submitted for decision under Rule 30. We find the facts to be as stipulated. We refer only to such facts as are necessary for our determination.

Petitioners Eleanor McClatchy and Charlotte Maloney are the beneficiaries of testamentary trusts Nos. 1 and 2, respectively, of three testamentary trusts created by Charles K. McClatchy, who died April 27, 1936. Each trust received one-third of his estate. These petitioners are also the executrices of the estate of Ella K. McClatchy, who died September 23, 1939. They represent the estate, which is the third petitioner herein. The returns in question were filed with the collector for the first district of California, at San Francisco.

The Franchise Tax Commissioner of the State of California, acting pursuant to section 34 of the California Personal Income Tax Act of 1935, assessed additional state income taxes against Charles K. McClatchy and Ella K. McClatchy after their deaths, as follows:

| Taxable period ended Dec. 31— | Date of Assessment | Additional assessment | |
|-------------------------------|--------------------|-----------------------|-------------------|
| | | Charles K. McClatchy | Ella K. McClatchy |
| 1935..... | Jan. 23, 1939 | \$1,791.64 | \$1,797.05 |
| 1936..... | Apr. 1, 1940 | 2,170.44 | 5,317.17 |
| Total..... | | 3,962.08 | 7,114.22 |

Payment of these taxes was protested and withheld pending the determination of the constitutionality of section 34 of the California Personal Income Tax Act of 1935.

On March 7, 1941, the Supreme Court of California determined that section 34 was constitutional. Payment on behalf of the two decedents was made on May 5, 1942, as follows:

| Decedent | Deficiency | Interest | Paid by— | Amount |
|-------------------------|------------|------------|---------------|------------|
| Charles K. McClatchy... | \$3,932.08 | \$1,309.33 | Trust #1..... | \$1,747.14 |
| | | | Trust #2..... | 1,747.14 |
| | | | Trust #3..... | 1,747.14 |
| Ella K. McClatchy..... | 7,110.22 | 2,264.59 | Total..... | 5,241.42 |
| | | | Estate..... | 9,374.81 |

No claim for the deduction of the taxes assessed against Charles K. McClatchy and paid by the three testamentary trusts was made in that decedent's final Federal income tax returns, filed March 15, 1937, or in that decedent's Federal estate tax return, which was filed July 24, 1937, and finally settled May 14, 1940. Deductions on account of the payment of these taxes plus interest were taken in 1942 by the parties paying them in that year.

The Commissioner increased the income distributable to petitioners Eleanor McClatchy and Charlotte Maloney from the Charles K. McClatchy trusts Nos. 1 and 2, respectively, in the amount of \$1,747.14, each for the year 1942.

No consents or waivers were filed pursuant to section 134 of the 1942 Revenue Act, or section 126 of the Internal Revenue Code, and the appropriate regulations.

The Commissioner allowed the estate of Ella K. McClatchy a deduction for 1942 Federal income tax purposes of \$1,113.92 representing interest on the state income tax deficiency accrued after the death of Ella K. McClatchy. The deduction of the \$7,110.22 state income tax and \$1,150.67 of the total interest thereon was disallowed.

Section 34 of the California Personal Income Tax Act of 1935 was repealed in 1937.

In December 1942 the state tax commissioner assessed additional deficiencies in income tax against Ella K. McClatchy as follows:

| Taxable Year | Tax | Interest | Total |
|--------------|----------|----------|----------|
| 1938..... | \$271.42 | \$63.85 | \$335.27 |
| 1939..... | 543.40 | 101.03 | 644.43 |
| Total..... | 814.82 | 164.88 | 979.70 |

These amounts were paid by the estate and claimed as a deduction in 1943. The Commissioner disallowed the deduction of the state income tax in the total amount of \$814.82 and \$7.22 of the interest that had accrued before the death of Ella K. McClatchy.

Ella K. McClatchy's final Federal income tax return covering the year 1939 up to the time of her death was filed March 15, 1940. On October 9, 1945, the estate filed a claim for refund of income tax allegedly overpaid in the amount of \$5,788.28 for the year 1939. The refund was denied January 6, 1947. Her Federal estate tax return was filed December 20, 1940, and a closing agreement was effected June 11, 1942. The deductions in question were not taken in either the final income tax return or the estate tax return. No waivers or consents were filed pursuant to section 134 of the Revenue Act of 1942 or section 126 of the Internal Revenue Code and the applicable regulations.

In December 1943 additional California inheritance tax of \$5,304.41, plus interest of \$2,223.41, was assessed and paid in 1943 in connection with the estate of Ella K. McClatchy. The beneficiaries of the Charles K. McClatchy trusts were also the beneficiaries of three trusts created by the last will of Ella K. McClatchy. The tax and interest were paid by the McClatchy newspapers and charged against the three testamentary trusts of Charles K. McClatchy. The three trusts claimed a deduction of the interest in their returns for 1943 which was disallowed by the Commissioner.

On June 1, 1944, the petitioner estate contended that the payments were improperly made by the trusts, and accordingly the McClatchy newspapers corrected these charges on their books and showed them made against petitioner estate. The estate now claims the deduction

for 1943 of the interest on the inheritance taxes. No other claim for the interest deduction has been allowed.

The returns in question were filed on the cash receipts and disbursements basis.

Both parties are in apparent agreement that the deductions claimed for the year 1942 on account of the payments of state income taxes assessed against the decedents, Charles K. and Ella K. McClatchy, together with interest accrued prior to their deaths, must be supported by the provisions of sections 23 (w) and 126, added to the Internal Revenue Code by section 134 of the Revenue Act of 1942,²⁷ since both taxes and interest

²⁷ SEC. 134. INCOME IN RESPECT OF DECEDENTS.

(a) GENERAL RULE.—The last sentence of section 42 (a) (relating to inclusion in gross income of amounts accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued only by reason of the death of the taxpayer shall not be included in computing net income for the period in which falls the date of the taxpayer's death."

(b) DEDUCTIONS AND CREDITS.—The last sentence of section 43 (relating to deductions and credits accrued up to death of taxpayer) is amended to read as follows: "In the case of the death of a taxpayer whose net income is computed upon the basis of the accrual method of accounting, amounts (except amounts includible in computing a partner's net income under section 182) accrued as deductions and credits only by reason of the death of the taxpayer shall not be allowed in computing net income for the period in which falls the date of the taxpayer's death."

(c) CROSS REFERENCE.—Section 22 (relating to definition of gross income) is amended by inserting at the end thereof the following:

"(1) INCOME OF DECEDENTS.—For inclusion in gross income of certain amounts which constituted gross income in respect of a decedent, see section 126."

(d) DEDUCTIONS OF ESTATE.—Section 23 (relating to deductions) is amended by inserting at the end thereof the following:

"(w) DEDUCTIONS OF ESTATE, ETC., ON ACCOUNT OF DECEDENT'S DEDUCTIONS.—

"(1) In the case of a person described in section 126 (b), the

were assessed against the decedents and not against the entities which made the payments on account thereof. See *Herbert G. Perry et al., Executors*, 32 B.T.A. 513; *Estate of Jacob S. Hoffman*, 36 B.T.A. 972; *Helvering v. Enright*, 312 U. S. 636; *Micajah Pratt Clough, Jr.*, 45 B.T.A. 97; *Courtney Burton*, 37 B.T.A. 636.

Respondent contends that, by reason of the plain and unambiguous language of section 134 (g), none of the statutory provisions relied on by petitioners are applicable to tax years beginning prior to December

amount of the deductions in respect of a decedent to the extent allowed by such subsection.

"(2) In the case of a person described in section 126 (a), the amount of the deductions in respect of a decedent to the extent allowed by section 126 (c)."

(e) The Internal Revenue Code is amended by inserting after section 125 the following new section:

"SEC. 126. INCOME IN RESPECT OF DECEDENTS.

* * * * *

"(b) ALLOWANCE OF DEDUCTIONS AND CREDIT.—The amount of any deduction specified in section 23 (a), (b), (c), or (n) (relating to deductions for expenses, interest, taxes, and depletion) or credit specified in section 31 (foreign tax credit), in respect of a decedent which is not properly allowable to the decedent in respect of the taxable period in which falls the date of his death, or a prior period, shall be allowed:

"(1) EXPENSES, INTEREST AND TAXES.—In the case of a deduction specified in section 23 (a), (b), or (c) and a credit specified in section 31, in the taxable year when paid,—

"(A) to the estate of the decedent; except that

"(B) if the estate of the decedent is not liable to discharge the obligation to which the deduction or credit relates, to the person who, by reason of the death of the decedent or by bequest, devise, or inheritance acquires, subject to such obligation, from the decedent an interest in property of the decedent."

* * * * *

(f) EFFECTIVE DATE OF AMENDMENTS.—The amendments made by subsections (a) and (b) of this section shall be applicable with respect to taxable years beginning after December 31, 1942, and the amendments made by subsections (c), (d), and (e) of this section shall be applicable with respect to taxable years ending after December 31, 1942.

(g) TAXABLE YEARS BEFORE 1943.—In case the taxable period in which falls the date of the death of the decedent began after

31, 1942, because no consents required as a prerequisite to such a retroactive application were filed by any of the entities involved in this proceeding. We agree with this contention.

Petitioners argue that the claimed deductions could not have been taken in the final income tax returns of the several decedents, since at that time there was no basis for an accrual of the items in question under the rule later stated by the Supreme Court in *Dixie Pine Products Co. v. Commissioner*, 320 U. S. 516; that, therefore, there was no election as to their deduction; that, consequently, no such consents as those mentioned in section 134 (g) were necessary; and that, therefore, none should be required.

December 31, 1933, and before January 1, 1943, the tax for such taxable period shall be computed as if provisions corresponding to the provisions of section 42 (a) and 43 of the Internal Revenue Code, as amended by subsections (a) and (b) of this section, were a part of the Revenue Act of 1934, the Revenue Act of 1936, the Revenue Act of 1938, or the Internal Revenue Code, whichever is applicable to such taxable period. In the case of the estate of such a decedent and of each person who acquires by reason of the death of such decedent or by bequest, devise, or inheritance from such decedent the right to receive the amount of items of gross income of the decedent which upon the application of the preceding sentence are not properly includible in respect of the taxable period in which falls the date of the decedent's death or a prior period, the tax for each taxable period ending on or after the date on which the decedent died shall be computed by including in gross income the amounts with respect to such decedent which would be includible, and by allowing as deductions and credits the amounts with respect to such decedent which would be allowable, if provisions corresponding to the provisions of the section inserted in the Internal Revenue Code by subsection (e) of this section were a part of the law applicable to such taxable period. The provisions of this subsection shall not be applicable unless there are filed with the Commissioner (in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, and at the time prescribed by such regulations) signed consents made under oath by the fiduciary representing the estate and by each such person (or if any such person is no longer in existence or is under disability, by his legal representative) that with respect to such amounts the tax of the estate, or the tax of such person, as the case may be, shall be computed under the provisions of this subsection for each taxable period ending on or after the date of the [death of the] decedent and the tax of the decedent shall be computed under such provisions for the taxable period of the decedent in which falls the date of his death. * * *

The short answer to this contention is that consents *are* required by the clear and unambiguous language of the statute. As the Supreme Court said in *Deputy v. DuPont*, 308 U. S. 488: “* * * we can not sacrifice the ‘plain, obvious and rational meaning’ of the statute even for ‘the exigency of a hard case’.” See also *Taft v. Commissioner*, 304 U. S. 351. Nothing in the legislative history or purpose of the statute in question casts doubt upon its meaning. Even if we were permitted to enlarge its meaning by construction (an untenable postulate, see *Journal Publishing Co.*, 3 T.C. 518, 522), we are of the opinion that the general character of the statute requires a narrow, rather than a broad, construction. See *Estate of Frances T. Ingraham*, 8 T.C. 701; *Larkin v. Commissioner*, 167 Fed. (2d) 115.

The next issue concerns the deductibility by an estate of interest accrued and paid upon deficiencies in state inheritance taxes. These taxes are not obligations of the estate. See secs. 2, 3, and 9, Act 8495 of the General Laws of California; *In re Belville's Estate*, (Cal. App. 1944), 152 Pac. (2d) 229; *Cohn v. Cohn*, 20 Cal. (2d) 65; 123 Pac. (2d) 833; *Estate of Kennedy*, 157 Cal. 517, 108 Pac. 280. See also *Louise G. Hill*, 37 B.T.A. 782. Therefore, the payment of interest by the estate on the inheritance tax deficiencies does not give rise to a deduction by the estate, even though we assume that the interest was paid by the estate in 1943, a matter concerning which we have considerable doubt.

Decision will be entered under Rule 50.

No. 12,292

IN THE

United States Court of Appeals
For the Ninth Circuit

HYMAN A. KRONBERG, a Minor, by his
guardian ad litem, William Farnum
White,

Appellant,

vs.

MAJOR GENERAL WILLIS H. HALE,
COLONEL WENTWORTH GOSS and
M/Sgt. HAROLD M. DART,

Appellees.

BRIEF FOR APPELLEES.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

422 Post Office Building, San Francisco 1, California,

Attorneys for Appellees.



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No. 12,292

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HYMAN A. KRONBERG, a Minor, by his
guardian ad litem, William Farnum
White,

Appellant,

vs.

MAJOR GENERAL WILLIS H. HALE,
COLONEL WENTWORTH GOSS and
M/SGT. HAROLD M. DART,

Appellees.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This is an appeal (Tr. 76-77) from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's motion for summary judgment as to the first cause of action, on the issue of liability alone, and granting appellees' motion for summary judgment as to the aforesaid first cause of action (Tr. 74). The Court below entertained the motions for summary judgment under Rule 56 of the

Federal Rules of Civil Procedure. Jurisdiction to review the order of the Court below is conferred upon this Honorable Court by Title 28 U.S.C.A. Sections 1291 and 1294.

STATEMENT OF THE CASE.

The facts and issues of this case are clearly set forth by the Court below in its memorandum opinion (Tr. 67-73), which appellees now quote in full:

“MEMORANDUM OPINION

ROCHE, District Judge: This matter is before the court on two motions for summary judgment as to plaintiff's first cause of action in which he seeks damages for false arrest and false imprisonment. Plaintiff has moved for summary judgment, interlocutory in character, on the issue of liability alone. Defendants Major General Willis H. Hale, Colonel Wentworth Goss and M/Sgt. Harold M. Dart have likewise moved for summary judgment. Pursuant to stipulation, the action has been dismissed as to the defendants Colonel Thomas B. White, M/Sgt. Joseph Glass and Major Ivan A. Allen. The motions have been submitted on an agreed statement of facts.

The basic question for decision is whether the military had jurisdiction to arrest this civilian plaintiff under the 94th Article of War. This Article deals with frauds against the United States and the applicable portion reads: ‘If any person, being guilty of any of the offenses aforesaid or who steals or fails properly to account for any money or other property held in trust by him

for enlisted persons or as its official custodian while in the military service of the United States, receives his discharge or is dismissed or otherwise separated from the service, *he shall continue to be liable to be arrested and held for trial and sentence by a court martial in the same manner and to the same extent as if he had not been so separated therefrom.*' (Emphasis supplied.) Plaintiff's suit arose out of his arrest and imprisonment pursuant to this provision.

The agreed statement sets forth the following facts. Plaintiff was discharged from the Air Force at Hamilton Field, Marin County, California, on April 7, 1947. On April 29, 1947, while he was in uniform, he was arrested by San Francisco police. He was taken to the Taraval Police Station and the Provost Marshal at Hamilton Field notified, the police suspecting plaintiff of being absent without leave. The Provost Marshal sent two Criminal Investigation Division agents, one of whom was the defendant Dart, to Taraval Police Station to make an investigation and report and upon the plaintiff's statement that he had been discharged from the Army, a Special Agent of the Federal Bureau of Investigation was called in to assist in the case. Both plaintiff and his wife consented to a search of their home by the Special Agent, with the resultant discovery of a parachute and many articles of Army clothing and other gear, valued at more than \$700, plus three letters indicating that this property had been fraudulently procured.

Plaintiff, who was still being held at the Police Station, then stated that the parachute had been issued to him at Hill Field, Utah, and that he had

not got around to turning it in, and that all the Army clothing had been purchased at surplus stores.

Between ten and eleven o'clock on the night of April 29, one of the CID agents reported by telephone to the Provost Marshal, who directed him to arrest and bring in the plaintiff. This was done and the plaintiff was confined in the Guardhouse at Hamilton Field, pending trial under the 94th and 96th Articles of War. On July 11, 1947, court-martial charges under the 94th Article of War were filed, alleging that plaintiff had knowingly and unlawfully applied to his own use one parachute and had feloniously taken and carried away the remaining government property discovered when his home was searched. These charges were served on the plaintiff on July 14, 1947, on which date he filed in this court a petition for writ of habeas corpus and an order to show cause issued. This order was heard on July 21, 1947, when by stipulation the petition was dismissed and the order to show cause discharged and plaintiff was released from military control to the United States Marshal and held in bail set at \$500. The present action for damages was filed in the state court and removed to this court by certiorari.

The parties have stipulated that the following four issues are to be determined at this time: (a) Did defendant Colonel Wentworth Goss (commanding officer at Hamilton Field during plaintiff's confinement) have jurisdiction to arrest the plaintiff under the 94th Article of War; (b) Assuming that Colonel Goss had such jurisdiction, did it lapse by reason of the lengthy delay be-

fore filing court-martial charges under the 94th Article; (c) Is the plaintiff entitled to actual damages by reason of his confinement from April 29, to July 22, 1947; (d) Is the plaintiff entitled to punitive damages because of such confinement.

Jurisdiction is the critical issue and it depends, in the first instance, on the constitutionality of Article 94. It is undisputed that plaintiff had served in the Army, had been honorably discharged, and was a civilian at the time of his arrest. It is further undisputed that he was not subjected to military arrest and imprisonment until after investigation had disclosed a substantial quantity of Government property in his possession, together with letters indicating strongly that such property had been either illegally obtained while he was in the service or illegally retained after his discharge. He therefore came squarely within the provision of Article 94 that makes the discharged soldier who is guilty of defrauding the Government liable to military arrest and courtmartial in the same manner and to the same extent as if he had not been separated from the service. Thus in ordering and making the arrest the defendants were not acting maliciously or in bad faith but, on the contrary, were performing a duty authorized by law and one which they had probable cause for believing necessary.

Plaintiff, however, takes the position that probable cause and good faith are unimportant because the pertinent provision of the 94th Article violates the Fifth Amendment which guarantees prosecution by presentment or indictment of a Grand Jury "except in cases arising in the land or naval forces." Plaintiff argues that a "case"

has not arisen until some step toward prosecution has been taken and if no step is taken prior to the soldier's return to civilian status, Congress is powerless to extend military jurisdiction over such discharged soldier.

There is some merit in the plaintiff's contention, particularly in view of the fact that our legal and political philosophy has never encouraged the extension of military jurisdiction over civilians, and it is unfortunate that this important question has never reached the higher courts for a definitive answer. With one exception, the few cases that have considered the point have held the provision constitutional. The first reported decision is that of *In re Bogart*, 3 Fed. Cas. 796, 799, No. 1,596, decided in 1873. There the court construed the phrase 'cases arising', as used in the Fifth Amendment, to mean 'events occurring' and held that, so construed, it covered an offense committed while the person was serving with the armed forces, even though prosecution was not instituted until after his discharge. The Bogart case was followed in *Ex parte Joly*, 290 Fed. 858, and *Terry v. United States*, 2 F. Supp. 962. The Joly case also stressed the fact that the 94th Article had been on the books since 1863 without being declared unconstitutional. The more recent case of *United States ex rel Flannery v. Commanding General*, 69 F. Supp. 661, held the Article unconstitutional, the court basing its decision on much the same grounds as those advanced in this case. The Flannery case was reversed by stipulation in the Court of Appeals for the Second Circuit, without opinion.

In view of the foregoing and since a statute's unconstitutionality will not be presumed, the Court holds that the pertinent provision of Article 94 is valid and plaintiff's arrest was thus within the jurisdiction of the defendant Goss.

There follows, then, the question whether jurisdiction was lost because plaintiff was held for 74 days before court-martial charges were filed, plaintiff contending that the delay was excessive and in violation of Article of War 70 which governs investigation and filing procedure in court-martial proceedings. While authority is divided on the question of whether the provisions of Article 70 are jurisdictional, the most recent cases hold that they are not—see *Durant v. Hiatt*, 81 F. Supp. 949, and *Humphrey, Warden etc. v. Smith*, U. S. Supreme Court, April 25, 1949. Even if they were, the delay in this case was not excessive, the record disclosing that extensive investigation both here and on the East coast was necessary before the charges could be drawn. The jurisdiction that validly attached was thus not lost and defendants are not liable in either actual or punitive damages.

It is, therefore, by the Court ORDERED that plaintiff's motion for summary judgment as to the first cause of action, on the issue of liability alone, be and the same is hereby DENIED and that defendants' motion for summary judgment be and the same is hereby GRANTED.

Dated: June 1st, 1949.

SGD: MICHAEL J. ROCHE
United States District Judge"

ISSUES.

The Court below, pursuant to an *Agreed Statement of Facts* (Tr. 54-60), considered and determined the following issues:

“a. That defendant Colonel Wentworth Goss did or did not have jurisdiction to arrest Hyman Ace Kronberg, plaintiff herein, under the 94th Article of War.

b. Assuming that the said defendant, Colonel Wentworth Goss, had jurisdiction to arrest Hyman Ace Kronberg, plaintiff herein, that such jurisdiction did or did not lapse by reason of the lengthy delay before filing court-martial charges under Article of War 94.

c. That Hyman Ace Kronberg, plaintiff herein, is or is not entitled to actual damages by reason of his confinement from 29 April 1947 to 22 July 1947.

d. That Hyman Ace Kronberg, plaintiff herein, is or is not entitled to punitive damages by reason of such confinement.” (Tr. 60.)

ARGUMENT.

Appellant complains in his brief that the Court below, in effect, deprived him of his right of trial by jury. It is difficult for appellees to understand such reasoning, particularly in view of the stipulation entered into between counsel that the Court below would determine whether or not the appellant was entitled to recover either actual or punitive damages. Had the Court below decided in favor of the appel-

lant rather than in favor of the appellees, a jury would have then been called upon to determine the amount of damages to which said appellant was entitled.

The appellant, in his brief, also challenges certain testimony favorable to the appellees. This testimony is found in Answers to Written Interrogatories and depositions on which counsel for appellant himself relied when he made his motion for summary judgment (Tr. 61-62). The making of the motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, was, of course, an admission by the parties that there was no genuine issue as to any material fact to be adjudicated. This belated challenge by appellant as to the factual situation of the case must, of necessity, fall of its own weight.

In considering the real issues involved herein, the following questions present themselves:

1. Is that portion of the 94th Article of War under attack constitutional?

2. Assuming, *arguendo*, that the 94th Article of War is unconstitutional, are those who proceed under its authority liable for their actions?

3. Was the 70th Article of War violated by the appellees herein, and if so, does such a violation give rise to an action for damages?

4. Assuming, also *arguendo*, that appellant is entitled to recovery, is he entitled to punitive as well as actual damages?

In defending their actions the appellees, in their answer in paragraphs VIII and IX, alleged, in pertinent part, as follows:

“* * * defendants, and each of them, allege that the arrest and subsequent detention of plaintiff was by virtue of and in enforcement of the laws of the United States respecting the military forces thereof, to-wit, the 94th Article of War (10 USCA Sec. 1566), and that any and all acts done by them, or any of them, in the premises were done under color of and by virtue of their said offices and status before set out, and the Article of War hereinbefore mentioned.

* * * that by virtue of the provisions of the 94th Article of War hereinabove mentioned, the plaintiff, being charged with commission of offenses committed while he was still in the service of the United States, was still amenable to the discipline of the United States Army Courts Martial.” (Tr. 28-29.)

I.

IS THAT PORTION OF THE 94TH ARTICLE OF WAR UNDER ATTACK CONSTITUTIONAL?

The Army has asserted the right to exercise jurisdiction over a discharged soldier by virtue of that portion of Article of War 94, 10 U.S.C.A. Section 1566, set forth by the Court below in its memorandum opinion.

In this connection reference is also made to paragraph 10, page 8, Manual for Courts-Martial 1928 as Amended, wherein it is stated:

“Jurisdiction as to certain cases of fraud and embezzlement is not terminated by discharge or dismissal. See A. W. 94.”

An early case, *In re Bogart*, 3 Fed. Cases 796, 799, No. 1596 (CC Cal 1873), cited by the Court below in its memorandum opinion, wherein the petitioner was held for trial by a naval court-martial for offenses alleged to have been committed while in the naval service, supported the provision of Article of War 94 for court-martial after discharge. It was contended in that case in behalf of the petitioner that jurisdiction must be exercised or, at least, must attach by an arrest and commencement of the prosecution before the connection of the offender with the service is legally severed by the expiration of his term of service, or by resignation, dismissal or other discharge; that Congress has no power to authorize a trial after the connection is so severed, and after the accused has become a private citizen. It was argued in support of this view that although the offense was committed while in the naval service, yet a “case” does not arise until a charge is actually made; and if the charge is not actually framed and presented till after the offender ceases to be in the service, it is not a “case arising in the land or naval forces” within the meaning of the Fifth Amendment to the Constitution. That portion of the opinion dealing with that point, and referring to the case of *Ex parte Milligan*, stated in part:

“Mr. Justice Davis, in the opinion of the Court, quotes the clause of the constitution,

'except in cases arising in the land and naval forces', and then in the very next sentence, in alluding to this class of cases, says: 'In pursuance of the powers conferred by the constitution, Congress declared the kinds of trial, and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service' thus manifestly, using the phrase 'offenses committed while the party is in the military or naval service,' is entirely synonymous with, and equivalent to, the phrase in the constitution, 'cases arising in the land and naval forces'. This indicates the construction put upon the provision by the supreme court in such terms, and under such circumstances, that we should not feel at liberty to disregard it, even if the construction were more doubtful than it appears to us to be. Indeed this seems to us to be the true construction.

There is, certainly, *no express limitation of the power of Congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased.* If the limitation exists, it must be *implied from a strained and unnatural construction to be given to the clause, 'cases arising in the land and naval forces'.*

* * * * *

But it is the united voice of a multitude of decisions that, where there is a reasonable doubt as to the unconstitutionality of an act of Congress, the law should be sustained.

* * * * *

When the supreme court and its justices go cautiously and sparingly exercise this power, the

use ought to be very clear to justify a subordinate Court in assuming such responsibility. The case now under consideration presents no such clear case. *We think the acts involved in this case constitutional.*" (Italics supplied.)

Appellees rely strongly on the reasoning in this case, and believe the following language therein, at page 801, is also particularly significant:

"This Court has no more right to assume or suppose that those who, by the constitution and laws, are made the depositaries of jurisdiction over military offenses, will abuse these powers, than that those who, by the same constitution and laws, are entrusted with the general civil jurisdiction of the land, will abuse the trust devolved upon them. It is, undoubtedly, the imperative duty, and we have no doubt that it will be the pleasure, of the judiciary to jealously and vigorously maintain its own jurisdiction in its utmost extent, for the protection of the citizen in all his rights of person and property; and to confine within their proper limits the special and limited jurisdiction of other tribunals. But, while this is so, it is no less its duty to abstain from tresspassing upon, or usurping the rightful powers of any other tribunal, however limited may be the sphere of its jurisdiction. A breach of this latter duty would be no less reprehensible than a breach of the former."

The *Bogart* case was followed in *Ex parte Joly*, 290 Fed. 858 (SD NY 1922), (also cited by the Court below in its memorandum opinion). In that case an emergency lieutenant colonel was honorably dis-

charged on September 23, 1920. Subsequently he was charged with having committed various offenses between February 1920 and July 1920, among which were violations of Article of War 94. He alleged that he was subsequently commissioned a Major in the regular establishment of the United States Army on February 5, 1921 and thus was a civilian from September 24, 1920 to February 5, 1921. This officer was tried by court-martial (beginning November 11, 1921) and convicted. The Court in the opinion stated in part:

“The ninety-fourth article was originally the Act of March 2, 1863. For nearly 60 years, therefore, the Congress has deemed it necessary, for the protection of the military arm and the nation itself, that a discharge shall not release a ‘person’ in the military service from liability to arrest and trial by a military tribunal for offenses committed prior to discharge. In such circumstances, *a court of first instance, under familiar rules, will not declare such statute unconstitutional, unless its infirmity is clear beyond doubt.*

The constitutionality of the statute was doubted in (1895) by Colonel Winthrop, a distinguished writer on military law, but he realized that such authority as there was held otherwise. There is no controlling authority on the question, but perhaps the most interesting case is *In Re Bogart*, Fed. Cas. No. 1596, 2 Sawy. 396. In the face, therefore, of more than half a century of practical construction and of the reported cases, *this court will not hold the act unconstitutional.*” (Italics supplied)

See also *United States ex rel. Pasala v. Fenno*, 76 F. Supp. 203, 206 (D. Conn.), citing *United States v. Tyler*, 105 U.S. 244; *Terry v. United States*, 2 F. Supp. 962.

Trial by court-martial after discharge under Article of War 94 was also upheld in *United States ex rel. Marino v. Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945). In that case Marino, who had enlisted in the United States Army on February 18, 1944, was honorably discharged on January 30, 1945. On May 14, 1945, Marino, while living with his father in Jersey City, New Jersey, was arrested and placed in confinement at the guard house at Mitchel Field, Long Island, N.Y. Marino was subsequently charged on July 6, 1945 with having committed various offenses, among which were violations of the 94th Article of War. He was subsequently tried by general court-martial and convicted. The constitutional question was not raised.

With reference to the unconstitutionality of the portion of Article of War 94 under consideration, the United States District Court, Southern District of New York, in *United States ex rel. Flannery v. Commanding General, Second Service Command, et al.*, 69 Fed. Supp. 661 (SD New York Feb. 21, 1946) held the reference provision of Article of War 94 repugnant to the indictment clause of the Fifth Amendment. In this connection it should be noted, however, that the *Flannery* cases were reversed without opinion, on stipulation of both parties, by the United States Court of Appeals for the Ninth Cir-

cuit in an unpublished order filed in case No. 20235, which reads as follows:

“Upon reading and filing the annexed stipulation and upon the underlying consent of William E. Slevin, Jr., Esq., attorney for the relator-respondent,

NOW, on motion of JOHN F. X. McGOHEY, United States Attorney for the Southern District of New York, attorney for the respondents-appellants herein, it is

ORDERED, that the order of the United States District Court for the Southern District of New York, dated and entered the 21st day of February, 1946, sustaining the relator's writ of habeas corpus, be and the same hereby is reversed; and it is further

ORDERED, that the writ of habeas corpus heretofore issued herein by the United States District Court for the Southern District of New York be and the same hereby is dismissed; and it is further

ORDERED, that a mandate of this Court to the foregoing effect be issued and transmitted to the Clerk of the United States District Court for the Southern District of New York, forthwith.

Dated: New York, N. Y.

April 18, 1946.

Thomas W. Swan
U.S.C.J.
Augustus N. Hand
U.S.C.J.

I hereby consent to the entry of the above order.

William E. Slevin, Jr.
Attorney for Relator-Respondent.”

It should be added, that a copy of the aforesaid order, which was received from the office of the United States Attorney for the Southern District of New York, was furnished to the Court below and to counsel for the appellant.

The recent decision in the case of *Hironimus v. Durant*, 168 F. (2d) 288 (C.C.A.-4), certiorari denied, 335 U.S. 818, upholds, by implication, that portion of Article of War 94 permitting trial of military personnel by courts-martial for crimes committed while in active service. The pertinent portion of that opinion reads, at page 293, as follows:

“Thus it has been held that a person discharged from the Navy or the Army before the commencement of a court-martial prosecution against him cannot thereafter be brought to trial before the court-martial for crimes committed while he was in active service *except as certain offenses for which the statutes make express provision.* * * * Manual for Courts-Martial, United States army, page 8, paragraph 10 * * *.” (Italics supplied.)

In the case of *United States ex rel. Hirshberg v. Cooke, Commanding Officer*, 336 U.S. 210, the Supreme Court of the United States suggested by way of dictum that Congress had the power to confer court-martial jurisdiction over discharged soldiers.

Furthermore, in the case of *Kahn v. Anderson*, 255 U.S. 1, the Supreme Court decided that a person held as a military prisoner, in punishment of a military offense of which he had been convicted, is subject to military law and to trial by court martial for offenses

committed during such imprisonment, even if the prior sentence resulted in his discharge as a soldier. In this case, the Supreme Court cited, with approval, the following rule laid down in *Ex parte Reed*, 100 U.S. 13, 21:

“ ‘The constitutionality of the acts of Congress touching army and navy courts martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court. Const., art. 1, sect. 8, and amendment 5. In *Dynes v. Hoover* (20 How. 65) the subject was fully considered and their validity affirmed.’ ”

The analogy of the situation, in *Kahn v. Anderson*, supra, and in our case at bar, is apparent.

In view of the foregoing decisions it may be concluded that the clear weight of authority upholds the constitutionality of that portion of Article of War 94 which permits a person subject to military law to be arrested, held for trial and sentence by court martial after discharge for the commission of offenses specified therein. Here it should be called to the attention of this Honorable Court that under the 39th Article of War prosecution under the 94th Article of War has a statutory limitation of three years. Finally, it should also be noted that the Revised Articles of War approved by the Congress June 24, 1948 (62 Stat. 627) and made effective February 1, 1949, retain essentially the same provisions now contained in Article of War 94. Had there been any serious question as to the constitutionality of any of the provisions of this 94th Article of War the Congress undoubtedly would

not have reenacted it into present law. This matter of administrative interpretation placed upon an Article of War and the question of reenactment is pointedly set forth in the decision of Circuit Judge Parker in *Stout v. Hancock*, 146 F. (2d) 741 at 744, reversing the decision of the District Court, 55 F. Supp. 330:

“It is well settled, of course, that the administrative interpretation placed upon the article is entitled to great weight, particularly in view of the fact that it has been called to the attention of Congress and that Congress has re-enacted the article without making any change in the clause relied on for the contrary interpretation. *R. J. Reynolds Tobacco Co. v. Commissioner of Internal Revenue*, 4 Cir., 97 F. 2d 302, 309, aff. *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 116, 59 S. Ct. 423, 83 L. Ed. 536. And aside from the question of re-enactment, it is well settled that administrative construction of a statute by the Executive Department charged with its enforcement is entitled to great weight, especially where, as here, it has continued over a long period and Congress has failed to alter or amend the statute. *Costanzo v. Tillinghast*, 287 U. S. 341, 345, 53 S. Ct. 152, 77 L. Ed. 350; *United States v. Jackson*, 280 U.S. 183, 193, 50 S. Ct. 143, 74 L. Ed. 361.”

The 94th Article of War being constitutional, it is, of course, obvious that the military authorities had jurisdiction to arrest and confine the appellant under its provisions.

II.

ASSUMING, ARGUENDO, THAT THE 94TH ARTICLE OF WAR IS UNCONSTITUTIONAL, ARE THOSE WHO PROCEED UNDER ITS AUTHORITY LIABLE FOR THEIR ACTIONS?

In *Cooper v. O'Connor*, 99 F. (2d) 135, at page 138, the Court of Appeals for the District of Columbia, citing supporting authorities, enunciated the prevailing rule:

“On the contrary, if the act complained of was done within the scope of the officer’s duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, *or because of an erroneous construction and application of the law.*” (Italics supplied.)

See also *Kendall v. Stokes*, 3 How. 87, 98; *Jones v. Kennedy*, 121 F. (2d) 40, 42, certiorari denied, 314 U.S. 665; *Laughlin v. Rosenman*, 163 F. (2d) 838; *Keppleman v. Upston* (D.C. Ca.), 84 F. Supp. 478.

The Supreme Court, in relation to Acts of Congress having been found unconstitutional, has said in *Chicot County Dist. v. Bank*, 308 U.S. 371, at page 374, that “a principle of absolute retroactive invalidity cannot be justified”. Certainly this is one type of case where such principle cannot be justified. Public policy, justice and fairness compel no other conclusion.

In view of the foregoing, it is obvious that so far as the arrest and imprisonment of the appellant is

concerned, under the 94th Article of War, he is not entitled to recovery.

III.

WAS THE 70TH ARTICLE OF WAR VIOLATED BY THE APPELLEES HEREIN, AND IF SO, DOES SUCH A VIOLATION GIVE RISE TO AN ACTION FOR DAMAGES?

It is the military law which governs the arrest and detention of persons subject to such law for offenses within the cognizance of the military authorities. 35 C.J.S. Section 20.

There is no law that requires the military to have a warrant issued prior to making an arrest, where, as in the case at bar, the alleged military offense was not committed in the presence of the arresting officer. In this connection, appellees quote the 69th Article of War, 10 U.S.C.A. Section 1541, which reads as follows:

“Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest as circumstances may require; but when charged with a minor offense only such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority. Any officer or cadet who breaks his arrest or who escapes from confinement, whether before or after trial or sentence and before he is set at liberty

by proper authority, shall be dismissed from the service or suffer such other punishment as a court-martial may direct; and any other person subject to military law who escapes from confinement or who breaks his arrest, whether before or after trial or sentence and before he is set at liberty by proper authority, shall be punished as a court-martial may direct. (June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 802.)”

It is the 70th Article of War, Title 10 U.S.C.A. Section 1542, which prescribes the manner in which charges and specifications must be signed, investigations conducted, and courts-martial commenced. This Title only prohibits unnecessary delay in investigating and carrying the case to a final conclusion. Discretion is vested in the hands of the military.

The 70th Article of War is now set forth in full:

“Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charges will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against

him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court-martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought

to trial before a general court-martial within a period of five days subsequent to the service of charges upon him. (June 4, 1920, c. 227, subchapter II, § 1, 41 Stat. 802.)”

That there was a delay between the time of the arrest of the appellant and the date the charges were filed against him is undisputed. That there is a reasonable explanation for such delay may be readily seen by reference to the deposition of Colonel Joel B. Olmstead, from which we now quote at length:

“Q. Can you state now what the reason, if any, was for the delay between the time of the arrest of the accused, the plaintiff in this case, Hyman A. Kronberg, and the date the charges were filed against him?

A. Coincident with the arrest of the accused, and as a result of an alleged consent to search, a number of things were found at the residence of the accused in San Francisco; and among the things found there were certain documents in the form of letters which indicated the likelihood that other property of the government might be found at the home of his brother in Brooklyn, New York. In view of the assertion by the accused that he had been discharged from the Army, and also in view of the indicated necessity for investigation in New York the FBI was called in and reports of the investigation indicated that investigations were made by the FBI in San Francisco, in Salt Lake City and in Brooklyn. We did not feel, perhaps I should say the accuser in this case, Sergeant Dart, did not feel that he could file charges until a complete

investigation of the incident had been made by the FBI, for the reason that charges by Court Martial are required by law to be sworn to either on the basis of personal knowledge of the matters stated, or in the alternative that he has investigated the matters set forth, and that they are true in fact to the best of his knowledge and belief. I believe I stated before that the first time I saw the complete FBI report was on the 25 June, which was dated the 18 of June.

Q. Dated at New York. That is part of the exhibit.

A. I believe dated San Francisco. It was received at our headquarters on the 25 June.

Q. 25 June at your headquarters?

A. Yes.

Q. Between the time of the receipt of the report and the time of the filing of the charges were there any other steps taken or any other reasons for delay in that connection?

A. Necessarily there would have to be some intervening time. There would be intervening time between the receipt of such a report, during which the accuser was relying upon the investigation, as was largely done in this case, made by the FBI or by other sources, to reach his conclusion as to what offense he believed had been committed, and seeking assistance, if necessary, in the drafting of these specifications, assembling of the necessary data to go with the charges.

Q. Do you recall whether or not there was any consideration of the possibility of this case being handled by the civil authorities?

A. There was.

Q. When was that? Was that prior to the time of the filing of the charges?

A. It was prior to the time of the filing of the charges; it was done upon receipt of the FBI report by Headquarters Fourth Air Force. I did not personally handle the matter. Major Allen, the base legal officer, came to the United States Attorney's office in San Francisco.

Q. Does Defendants' Exhibit B show anything in that connection?

A. To the best of my knowledge it does not disclose anything. As I said I did not participate but it was at my suggestion that—

Q. What was your suggestion in that respect?

A. That Major Allen submit the information that we had in connection with this matter to the United States Attorney and indicate tendering the prosecution of the accused to the civil authorities.

Q. That was your direction to Major Allen or suggestion?

A. It was a suggestion for the reason that Major Allen was not under my command.

Mr. White. When was that?

Mr. Licking. Q. That took place before you say the charges in the case were filed and subsequent to the receipt of the FBI report?

A. I don't know whether it took place before we received the report or it was very shortly, very shortly, after it.

Q. After you received the FBI report did Major Allen report to you?

A. He subsequently reported to me that the United States Attorney's office did not desire to

carry forward with the prosecution in the civil courts. I do not know whether I should state by hearsay what was told to me as a reason for that. There was one further thing in this particular case which entered into the picture of delay. Prior to the time we received the FBI report but when I had gotten in form a lot of the purported facts which were later borne out in the reports, and realizing the possibility that evidence would be taken, this would be a matter for the Army to handle, since it did involve the prospective trial of a civilian, pursuant to instructions which had been received some two years previously with reference to all such cases on the 13 June I prepared a report of the chief known facts to the Adjutant General of the Army requesting instructions.

Q. Does that report appear in that file?

A. That report appears in Defendants' Exhibit B in the form of a copy of the message which went out by teletype to the Adjutant General, and we received an acknowledgment of the receipt of that, with the advice that the problem would be considered there and we would receive an answer later. The first endorsement to that message was dated, as I recall it——

Mr. White. It will speak for itself.

A. It was received at headquarters Fourth Air Force on 7 July. Upon the receipt of it I took it to General Hale and showed him the reply which we had received.

Mr. Licking. Q. That is shown in Defendant's Exhibit B?

A. It appears as a first endorsement to the basic radiogram, and there is a true copy of that

message—it is certified as a true copy; and it is dated 3 July.

Q. And the instructions there are what?

A. The instructions are 'it is considered that the question of whether this particular accused should be held for trial and indictment by court martial is a matter for your determination.' It is addressed to General Hale. His decision in the case was that it being a matter for his determination that we would proceed to trial of the case. Immediately upon receiving that decision from General Hale I advised the Provost Marshal at Hamilton Field, and between that date, the 7th of July and 11th of July the charges were prepared and were brought to me on the morning of the 11th of July.

Q. Is there anything more in connection with it that might be of interest to the court or jury?

A. I know of nothing.

Q. I might ask one more question: is there any provision for the release of a person under arrest by military authorities on bail?

A. There is no such provision.

Q. There is no such provision?

A. No." (Tr. 121-125.)

* * * * *

"Q. Now basing your answer, Colonel, on your experience since 1935 in the administration of military justice, and in that connection your experience has been almost entirely in a supervisory capacity, that is you have been directing the administration of military justice by officers having the immediate duty.

A. That is correct. During the first four years I was assistant Staff Judge Advocate to the Staff

Judge Advocate of the Ninth Corps Area in San Francisco.

Q. All your experience has been in that special field supervising other officers having the power to prefer charges.

A. Yes.

Q. And make arrests?

A. Yes.

Q. You are familiar with the facts in this particular case as reflected in the record and as you testified from your informal and official conferences with different officers concerned.

A. Yes.

Q. Basing your answer on your experience and your familiarity with the facts in this case do you consider yourself competent to express an opinion as to whether or not the charges in this case, whether the time that elapsed in the case between the time of the arrest and the time the charges were preferred was within the meaning of the Article, practical—can you express such an opinion?

A. Yes, I believe I can, the determination of the question of whether there has been unnecessary delay must necessarily rest upon the facts of the particular case.

Q. In this particular case you say you are competent to express that opinion?

A. I feel I am.

Q. Can you state whether or not in your opinion the delay in this case was under the circumstances practical?

A. I do not believe there was any unnecessary or unreasonable delay at any point.

Q. Can you state the general basis of your opinion?

A. Only this, that I was in rather frequent informal contact with the people who were actually going forward with the investigation of this case in so far as the military service was concerned. I had no direct control over the activities of the FBI; in so far as the military was capable of going forward independently of the FBI I continually urged that they carry forward as rapidly as possible.

Q. As I understand, in your opinion it was necessary to await the report of the Federal Bureau of Investigation?

A. It was necessary in my opinion. Even after we had obtained all the findings of the FBI report in San Francisco, the indications were that the report of the New York office might very well result in availability of evidence which would indicate the propriety of additional charges which are not involved in the present one, charges involving additional amounts of property." (Tr. 136-138.)

Bearing in mind that there were numerous articles of clothing involved, both here and in New York, the type of clothing involved, and the investigation required both here and in New York and elsewhere, it is obvious that there was no unreasonable delay in preferring the charges against the appellant. The explanation of Colonel Olmstead is a very plausible one in the light of the situation presented herein. Here, we have a case where the appellant, when apprehended by police, was wearing the uniform of his country. It was the police that called the military authorities into the case and, with the consent of the appellant, his house was searched. A vast quantity of

clothing and equipment, ostensibly belonging to the armed forces, were found in his possession. In addition, the officers found a 32-calibre automatic pistol and a police blackjack. The appellant was then placed under arrest and taken to Hamilton Field, where he was confined. While at Hamilton Field, he attempted to bribe a guard, M/Sgt. J. W. Knowles, to send a telegram to his brother in the East. (Tr. 96-97.) The telegram read as follows:

“Meyer, Get rid of clothes immediately. Cant explain. SOS. parties will check yours and mama’s house. Ace.” (Tr. 99.)

Counsel for the appellant complains that the 70th Article of War was violated, in that no charges having been preferred within 8 days, Colonel Goss failed to transmit a written report to his superior officer. That there was a report made, though only orally, is attested to by the testimony of Colonel Olmstead. In this regard, we call attention to Paragraph 15, of the Agreed Statement of Facts, which reads as follows:

“That upon receiving the report of investigation from the CID Agents through the Provost Marshal, Colonel Wentworth Goss consulted with Major Ivan A. Allen, Legal Officer on his staff, and Colonel Joel B. Olmsted, Staff Judge Advocate of Headquarters Fourth Air Force.” (Tr. 58.)

But even if the consultation by Colonel Goss with Colonel Olmstead, the Staff Judge Advocate, would not be deemed a report to a superior officer, as contem-

plated by the 70th Article of War, there is no remedy by civil suit for this alleged failure to make a report, or, as a matter of fact, for any violation of this Article. Congress has provided an exclusive remedy in the 70th Article of War, and that is a court-martial of the officer who fails in his duty in this respect. The appellees have insisted, and still insist, that the actions of the military in this regard were reasonable. The testimony of Colonel Olmstead, standing alone, would be sufficient evidence to justify their contention. But, assuming for argument's sake only, that the conduct of the appellees was not reasonable, appellant would still not be entitled to damages. Appellees will concede that the delay in bringing an accused person to trial beyond the constitutional or statutory limit is a jurisdictional question in civilian courts, but, so far as the military is concerned, the application of the due process provisions of the Sixth and Fifth Amendments has been denied by the Supreme Court many times. In *Ex parte Quirin*, 317 U.S. 1, 40, the Court said:

“Such cases are expressly excepted from the Fifth Amendment and are deemed excepted by implication from the Sixth.”

Again, in *Reaves v. Ainsworth*, 219 U.S. 296, 304, the same rule appears:

“To those in the military or naval service of the United States the military law is due process.”

See also *United States v. Weeks*, 259 U.S. 336.

The remaining question therefore is whether or not delay in bringing an accused to trial, within the meaning of the 70th Article of War, can cause a properly constituted military court to lose jurisdiction of the accused. The recent case of *Humphrey v. Smith*, 336 U.S. 695, cited in the opinion of the Court below in our case at bar, dealt primarily with the investigation procedure under the 70th Article of War, but the reasoning, particularly in the portion italicized below, applies equally to all parts of the 70th Article of War:

“We hold that a failure to conduct pre-trial investigations as required by Article 70 does not deprive general courts-martial of jurisdiction so as to empower courts in habeas corpus proceedings to invalidate court-martial judgments. It is contended that this interpretation of Article 70 renders it meaningless, practically making it a dead letter. This contention must rest on the premise that the Army will comply with the 70th Article of War only if courts in habeas corpus proceedings can invalidate any court-martial conviction which does not follow an Article 70 pre-trial procedure. *We cannot assume that judicial coercion is essential to compel the Army to obey this Article of War.* It was the Army itself that initiated the pre-trial investigation procedure and recommended congressional enactment of Article 70. A reasonable assumption is that the Army will require compliance with the Article 70 investigatory procedure to the end that Army work shall not be unnecessarily impeded and that Army personnel shall not be wronged as the result of unfounded and frivolous court-martial charges and trials.”

The question of delays, under the 70th Article of War, is dealt with in the case of *Durant v. Hiatt*, 81 F. (2d) 948, likewise relied upon by the Court below, wherein it was said:

“The failure of the military authorities to direct an investigation of the charges against petitioner dated June 8, 1946, and his continuous confinement without such investigation and trial, until November, 1946, when the charges upon which petitioner was tried and convicted were filed and investigated, presents no ground of avoidance of the legal effect of the trial and conviction upon the charges later filed and proceeded with. It might be stated, in extenuation of the delay, that the charges involved a case of magnitude and its preparation required extensive investigation. Furthermore, separate trials were had of two others alleged to have been implicated in the offense and required the same witnesses and each of these trials continued for several weeks. There is no substantial showing in the record that this confinement or delay prejudiced the petitioner in his defense.”

See also *Duval v. Humphrey*, 83 F. Supp. 457, 462, 463; *Richardson v. Zuppan*, 174 F. (2d) 829.

Accordingly this conclusion must be reached, in the language of the Court below:

“The jurisdiction that validly attached was thus not lost and defendants are not liable in either actual or punitive damages.” (Tr. 73.)

IV.

ASSUMING, ALSO ARGUENDO, THAT APPELLANT IS ENTITLED TO RECOVERY, IS HE ENTITLED TO PUNITIVE AS WELL AS ACTUAL DAMAGES?

In the Agreed Statement of Facts, the Court below was asked to determine whether the appellant was entitled to punitive damages as well as actual damages for his confinement. The Court below, as above indicated, found against him on both issues. To be entitled to recover punitive damages the actions of the alleged wrong-doer must be wanton and malicious. Here we quote from the case of *Walsh v. Segale*, 70 F. (2d) 698, 699, which lays down the prevailing rule:

“Every legal wrong which entitles the party injured to recover damages permits him to recover compensatory damages for the injury inflicted. Not every legal wrong entitles the party to recover exemplary damages. To recover such damages, the act complained of must not only be unlawful, but it must also partake somewhat of a criminal or wanton nature. Such damages may be recovered where the wrongful act complained of is characterized by wilfulness, malice, oppression, brutality, insult, recklessness, gross negligence or gross fault. It is generally recognized that, in cases of personal torts, ‘vindictive actions’, such as assault and battery, slander, libel, seduction, criminal conversation, malicious arrests, and prosecutions, where the elements of fraud, malice, gross negligence, cruelty, or oppression are involved, punitive or exemplary damages may be recovered. *Milwaukee & St. Paul R. R. Co. v. Arms*, 91 U.S. 489, 23 L.Ed. 374;

Brown v. Evans, 17 F. 912 (C.C. Nev.), 109 U.S. 180, 3 S. Ct. 83, 27 L.Ed. 898; *Hudson v. L. & N. R. R. Co.* (C.C.A.) 30 F. (2d) 391; *Dreimuller v. Rogow*, 93 N.J. Law, 1, 107 A. 144."

The Court below, in its opinion, did not find the actions of the appellees to be malicious or wilful, but, on the contrary, determined that:

"* * * , the delay in this case was not excessive, the record disclosing that extensive investigation both here and on the East coast was necessary before the charges could be drawn." (Tr. 73.)

Since the findings of a trial court can not be set aside unless clearly erroneous, in view of the evidence in this case, the Court below should be sustained in its decision that the appellant is not entitled to punitive damages. *Gimpelson v. Kaufman* (C.C.A.-9), 167 F. (2d) 672.

As a matter of fact, because of the rule enunciated by the Supreme Court in *Wilkes v. Dinsman*, 7 How. 89, that civil courts do not interfere with the acts of military authorities within the scope of their jurisdiction unless the wrongdoer has maliciously and wilfully exercised lawful authority, there can be no recovery whatsoever for appellant, since a finding that the appellant was not entitled to punitive damages is a finding that the appellees acted without malice. The *Wilkes* case was recently cited with approval by the Supreme Court of the United States in the case of *Duncan v. Kahanamoku*, 327 U.S. 304, at page 313, wherein "the well-established power of the

military to exercise jurisdiction over members of the Armed Forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war," was conceded, although the exact point of civil redress for malicious exercise by the military of lawful authority was not considered in the *Duncan* case. See also *Dinsman v. Wilkes*, 12 How. 390, and *Keppleman v. Upston*, supra.

Appellees have, at great length, discussed the proposition of the reasonableness of their actions, not because a contrary showing of unreasonableness would have supported a claim for damages against them, but because they desire that the record be made clear in this regard. Their actions were not malicious, their actions were not unreasonable; on the contrary, their actions were reasonable, justifiable and proper, and the Court below so held. Appellees likewise ask this Honorable Court to so find.

In the opinion of the appellees the appellant has failed to state a cause of action. Because of this they have not concerned themselves with the undisputed principle that no personal liability is incurred by military men for obedience to a lawful order of a superior officer, *Despan v. Olney*, 7 Fed. Cas. No. 3822, which would be determinative of the matter as to who, among the appellees, would be liable, if the

appellant could possibly state a cause of action. See also *Tracy v. Cloyd*, 10 W. Va. 19, wherein it was held that a person in command is not liable for a trespass committed without his knowledge or abetment. See also *Keppleman v. Upston*, supra, for a discussion of the principle of liability in California, if any, of a member of the military acting under the orders of his superior officers. See likewise *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952, wherein, at page 955, the District Court for the Northern District of Alabama said:

“The present case comes clearly within the principle that the performance by executive officers of discretionary governmental duties entrusted to them by statute is not subject to judicial review. This principle has been reiterated time and again in mandamus proceedings to compel executive action, in injunction suits to prevent executive action, and in actions such as that at bar for damages claimed to have resulted from executive actions.”

Appellees have likewise not concerned themselves with the contention of appellant that under the ancient doctrine of trespass *ab initio*, the subsequent detention which he deemed to be misconduct, related back to make the original act wrongful as well, for the apparent reason, as hereinabove stated, that the detention of appellant was not improper, and for the additional reason that this doctrine of trespass *ab initio* has been greatly criticized. See *Restatement of Torts*, Section 136 (d). Appellant, in his brief, (p. 6), states that when he was turned over to the federal

civil authorities for prosecution the Grand Jury refused to indict him. Appellant no doubt introduced this collateral matter in his brief as evidence that the treatment accorded him by the military was unfair and unjust. Inasmuch as the Grand Jury proceedings are secret, appellant does not know what actually transpired during the deliberations of that body. It may be, and this is only conjecture, that the Grand Jury felt that the appellant, having been confined for 77 days, should be shown mercy in view of his prior service in the armed forces, although justice might have dictated a contrary result. In any event the action of the Grand Jury is immaterial to the problems involved herein. Our concern is with the following questions, heretofore discussed:

1. Is that portion of the 94th Article of War under attack constitutional?

2. Assuming, *arguendo*, that the 94th Article of War is unconstitutional, are those who proceed under its authority liable for their actions?

3. Was the 70th Article of War violated by the Appellees herein, and if so, does such a violation give rise to an action for damages?

4. Assuming, also *arguendo*, that appellant is entitled to recovery, is he entitled to punitive as well as actual damages?

SUMMARY.

Appellees have shown that the portion of the 94th Article of War under attack is constitutional, and that, accordingly, the arrest and confinement of the appellant herein was proper. Appellees have also shown that the 70th Article of War was not violated and that jurisdiction to arrest appellant did not lapse by reason of the lengthy delay in filing court-martial charges against him. The appellees have further shown that those who act under a statute subsequently declared unconstitutional are not liable, as they are likewise not liable for violations of the 70th Article of War.

In view of these facts, and the further fact that the Court below found the actions of the appellees to be reasonable, it goes without saying that its conclusion that the appellant was not entitled to recover either actual or punitive damages was a proper determination of the issues, and a just one.

CONCLUSION.

Appellant's motion for summary judgment was properly denied. Appellees' motion for summary judgment was properly granted. A contrary decision might have meant a flood of groundless litigation in the civil courts, not so much from former members of the military forces who might challenge the constitutionality of the 94th Article of War, but from dissident and disgruntled members of the armed forces, who, in

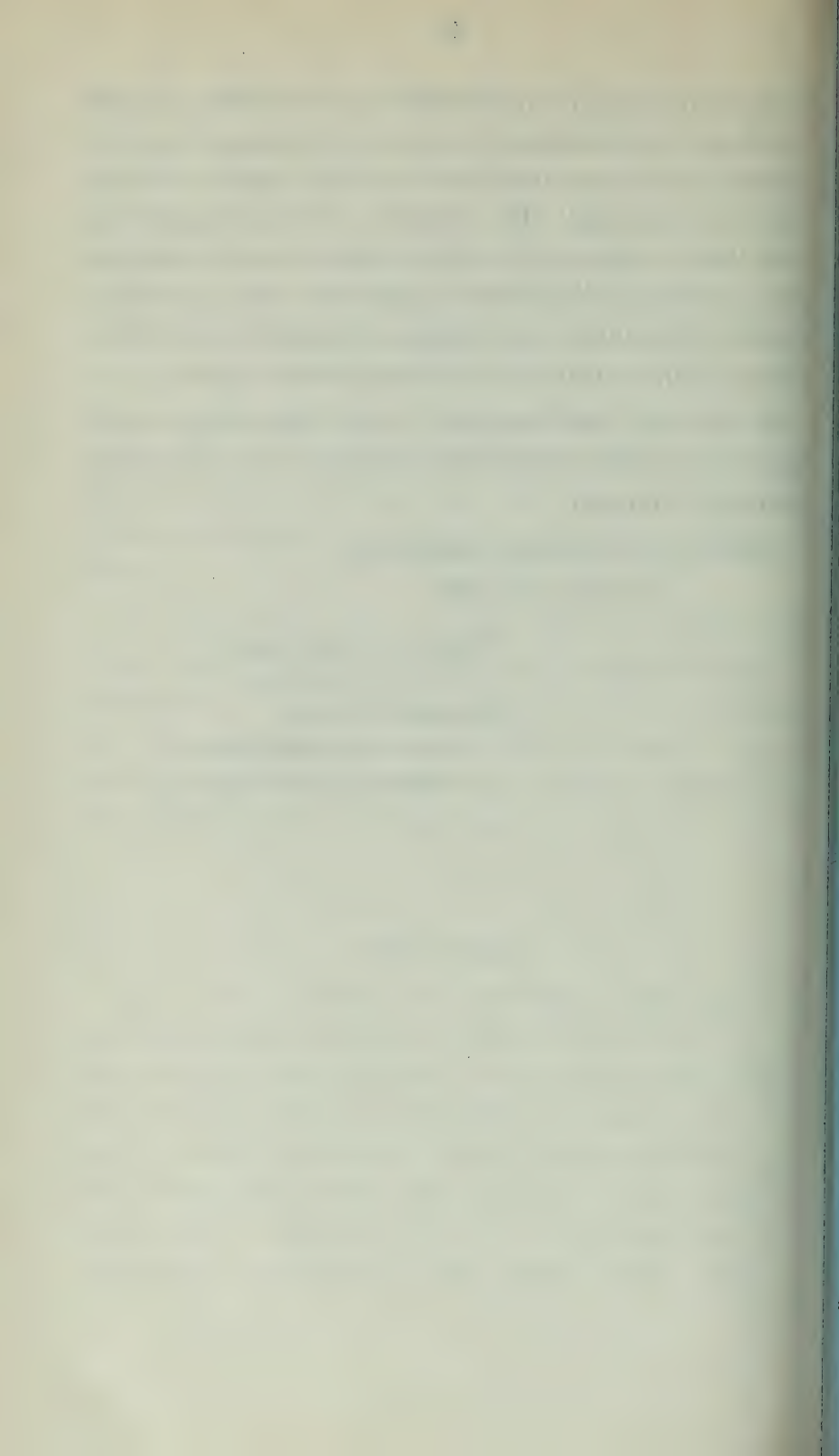
order to needlessly harass their superior officers, would challenge their actions by suits for damages in civil courts, on the ground that the 70th Article of War had been violated. The framers of the Constitution and the Congress of the United States which enacted the Articles of War never intended such a result, a result which might well impair the morale and discipline of the armed forces of the United States.

In view of the foregoing, it is respectfully urged that the decision of the Court below was correct and should be affirmed.

Dated, San Francisco, California,
November 21, 1949.

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellees.



No. 12294

United States
Court of Appeals
For the Ninth Circuit.

KURT GUSTAF NORDGREN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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Division Number One

FILED

SEP 26 1949

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CLERK

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Transcript of Record

Appeal from the District Court for the Territory of Alaska,
Division Number One

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

HOWARD D. STABLER,

Juneau, Alaska,

For Appellant.

P. J. GILMORE, JR., U. S. Attorney,

Juneau, Alaska,

For Appellees.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 2505-B

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KURT GUSTAF NORDGREN,

Defendant.

INDICTMENT

Vio. Sec. 91 of Title 18, U.S.C.A. 1946
(Bribery).

The Grand Jury Charges:

On or about the 12th day of August, 1948, in Division Number One, Territory of Alaska, Kurt Gustaf Nordgren did knowingly, wilfully, unlawfully and feloniously offer and give William McKenzie the sum of Two Hundred (\$200) Dollars in lawful money of the United States; said William McKenzie being a person acting for and on behalf of the United States in an official function, under and by authority of the Fish and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Red Fish Bay, Baranof Island, Alaska, then and there closed to commercial fishing for salmon, to report and disclose to officials of said Fish and Wildlife Service, and other law enforcement officials, and to arrest and cause the arrest and prosecution of, all persons

fishing illegally for salmon in said closed area; knowing said William McKenzie was a person acting for and on behalf of the United States in an official function with duties as aforesaid, and with the intention on the part of said Kurt Gustaf Nordgren to influence and induce William McKenzie to do an act in violation of his lawful duties, that is to say, to unlawfully refrain from and omit to report and disclose to officials of the Fish and Wildlife Service and other law enforcement officials that said Kurt Gustaf Nordgren did fish illegally in said area closed to commercial fishing for salmon, and to refrain from arresting or causing the arrest and prosecution of said Kurt Gustaf Nordgren for fishing illegally in said area.

A True Bill:

THOMAS A. MORGAN,
P. J. GILMORE, JR.,
U. S. Attorney,

Witnesses:

GOMER W. HILSINGER,
WM. McKENZIE.

[Title of District Court and Cause.]

VERDICT

We, the Jury empaneled and sworn in the above entitled cause, find the defendant guilty as charged in the Indictment.

Dated at Juneau, Alaska, this 19th day of April, 1949.

E. K. GUERIN,
Foreman.

[Endorsed]: Filed March 20, 1949.

In the District Court for the Territory of Alaska,
Division Number One at Juneau

No. 2505-B

UNITED STATES OF AMERICA,
Plaintiff,
vs.

KURT GUSTAF NORDGREN,
Defendant.

JUDGMENT AND COMMITMENT

Now, to wit, on this 22nd day of April, 1949, this matter came before the Court for imposition of sentence on the above-named defendant, Kurt Gustaf Nordgren, upon the verdict of the jury duly empaneled, sworn and charged in the above-entitled cause and returned into Court on the 20th day of

April, 1949, by which verdict the above-named defendant, Kurt Gustaf Nordgren, was found guilty of the crime of Bribery, in violation of Section 91, Title 18, United States Code Annotated, 1946 ed., as charged in the indictment heretofore returned by the Grand Jury and filed herein on the 7th day of March, 1949; the defendant being present and represented by his counsel, Howard D. Stabler; Stanley D. Baskin, Assistant U. S. Attorney, appearing for and on behalf of the United States; the defendant being asked if he had any good and sufficient reason to state why sentence should not now be imposed upon him, to which he offered none, and the Court being fully advised in the premises,

Hereby Orders, Adjudges and Decrees that it is the Judgment of the Court that the defendant, Kurt Gustaf Nordgren, is guilty of the crime of Bribery, as set out in Section 91, Title 18, United States Code Annotated, 1946 ed., as charged in the indictment, and it is the Sentence of the Court that the defendant, Kurt Gustaf Nordgren, be imprisoned in the Federal Penitentiary at McNeil Island, Washington, or such other institution as the Attorney General of the United States may direct, for a period of Fourteen (14) Months, and pay a fine of Two Hundred Dollars (\$200.00), and that the said defendant, Kurt Gustaf Nordgren, stand committed until the sentence herein imposed is fully executed, and

It Is Further Ordered that the Clerk deliver a certified copy of this Judgment and Commitment

to the United States Marshal or other qualified officer and that the same shall serve as a commitment herein.

Done in open court this 22nd day of April, 1949.

GEORGE W. FOLTA,

District Judge.

[Endorsed]: Filed May 11, 1949. [4*]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant Kurt Gustaf Nordgren and moves the court to grant him a new trial for the following reasons:

1. The evidence submitted on the part of the prosecution showed that William McKenzie accepted the bribe from the defendant, and was therefore an accomplice in the commission of the offense charged, and there was no corroboration of the accomplice testimony as required by section 66-13-59 ACLA 1949; and the court failed to instruct the jury that the testimony of an accomplice ought to be viewed with distrust, as required by subdivision fourth of section 58-5-1 ACLA 1949.

2. The prosecution failed to show or prove the offense of bribery charged in the indictment, or any offense, because the evidence submitted failed to show that William McKenzie, the alleged bribe taker, was an officer of the United States, or a per-

* Page numbering appearing at bottom of page of original certified Transcript of Record.

son acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government, as charged in the indictment, within the meaning of section 91, Title 18 USCA.

3. Instruction No. 6 given by the court was erroneous in this: The Court charged that William McKenzie was, at the time charged in the indictment:

“a person acting for and on behalf of the United States in the function of conserving and protecting the commercial salmon fisheries of Alaska, under and by authority of the Department of the Interior” whereas section 91, Title 18 USCA, defining the offense charged requires that said function be an “official function.”

4. Instruction No. 7 given by the court was erroneous in this: The Court charged that,

“If you find from the evidence beyond a reasonable doubt that the defendant on or about August 12, 1948, offered or gave \$200 to William McKenzie, then and there a person acting for and on behalf of the United States, under and by authority of the Department of the Interior, in apprehending or arresting or causing the apprehension, arrest or conviction of persons fishing commercially for salmon in the closed waters of Red Fish Bay, knowing that he was such a person . . . you should convict him”

in that it directs a conviction if the defendant knew William McKenzie was “a person acting for or on

behalf of the United States, under and by authority of the Department of the Interior," and performing the duties stated, whereas section 91, Title 18 USCA, defining the alleged offense charged in the indictment would require the said William McKenzie to be acting for and on behalf of the United States in an "official function," under and by authority of the Department of the Interior. [5]

5. The court erred in denying the defendant's motion for acquittal at the conclusion of the Government's evidence, and at the conclusion of all the evidence.

6. The court erred in refusing to give defendant's instruction No. 1.

7. The verdict is contrary to the weight of the evidence.

8. The verdict is not supported by substantial evidence.

9. Other manifest error appearing of record to which objection was taken and exception reserved.

Dated: Juneau, Alaska, April 25, 1949.

HOWARD D. STABLER,

Attorney for Defendant.

Copy hereof received April 25, 1949.

STANLEY D. BASKIN,

Assistant U. S. Attorney.

[Endorsed]: Filed April 2, 1949. [6]

[Title of District Court and Cause.]

SUPPLEMENTAL MOTION FOR NEW TRIAL

Comes now the defendant Kurt Gustav Nordgren and moves the Court to grant him a new trial for the following supplemental reason:

10. The prosecution's evidence failed to show that said William McKenzie had the duty or authority to apprehend or arrest or cause the apprehension or arrest or conviction of persons fishing commercially for salmon in the closed waters of Red Fish Bay for the reason that the prosecution failed to show that said William McKenzie was an officer or employee of the Fish and Wild Life Service of the Department of the Interior "designated by the Director" of the Fish and Wild Life Service of the Department of the Interior so as to be a peace officer as required by section 227 Title 48 United States Code; or authorized by the Secretary of the Interior to enforce the fisheries laws and regulations as prescribed by section 192 Title 48 United States Code, or was a law enforcement officer as prescribed by section 248a Title 48 United States Code.

Dated: Juneau, Alaska, April 28, 1949.

HOWARD D. STABLER,
Attorney for Defendant.

Copy hereof received April 28, 1949.

STANLEY D. BASKIN,
Assistant U. S. Attorney.

[Endorsed]: Filed April 28, 1949. [7]

[Title of District Court and Cause.]

ORDER DENYING MOTION AND SUPPLEMENTAL MOTION FOR NEW TRIAL

On April 29, 1949, this matter came before the above entitled court on the defendant's motion and supplemental motion for new trial, attorney Howard D. Stabler appearing for the defendant, and Assistant United States Attorney Stanley Baskin appearing for the United States. Argument was had and the matter taken under advisement by the court.

Now, the law and the premises being fully understood and considered by the court, it is Ordered that said motion and supplemental motion for new trial be, and they are hereby, denied; and exception is allowed the defendant.

Done in open court at Juneau, Alaska, the 11th day of May, 1949.

GEORGE W. FOLTA,
District Judge.

Copy hereof received May 11, 1949.

STANLEY D. BASKIN,
Assistant U. S. Attorney.

[Endorsed]: Filed May 11, 1949. [8]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: Kurt Gustaf Nordgren.

Name and address of appellant's attorney: Howard D. Stabler, Postoffice box 546, Juneau, Alaska.

Offense: Bribery, in violation of section 91 Title 18 United States Code.

Concise statement of judgment or order, giving date, and any sentence:

Judgment entered as of April 22, 1949, finding the appellant guilty of the offense of bribery, in violation of section 91 Title 18 United States Code, as charged in the indictment, and sentencing him to serve fourteen (14) months imprisonment in McNeil Island Penitentiary, in the State of Washington, or such other penal institution as the Attorney General of the United States may direct, and to pay a fine of \$200.00.

Name of institution where now confined, if not on bail: Federal Jail, at Juneau, Alaska.

I, the above named appellant, hereby appeal to the United States Court of Appeals from the above stated judgment.

Dated: Juneau, Alaska, the 12th day of May, 1949.

/s/ KURT GUSTAF NORDGREN,
Appellant.

Copy hereof received the 12th day of May, 1949.

STANLEY D. BASKIN,
Assistant U. S. Attorney.

[Endorsed]: Filed May 12, 1949. [9]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF RECORD

Be It Remembered, that on the 18th day of April, 1949, at 10:00 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for trial before a jury, the Honorable George W. Folta, United States District Judge, presiding; the Government appearing by Stanley D. Baskin, Assistant United States Attorney, and Ernest E. Bailey, Assistant United States Attorney; the defendant appearing in person and by Howard D. Stabler, his attorney; and both sides having announced they were ready to proceed;

Thereupon, a jury was duly empaneled and sworn to try the cause; whereupon, Stanley D. Baskin, Assistant United States Attorney, made the opening statement to the jury in behalf of the Government; and thereafter Howard D. Stabler, attorney for the defendant, made the opening statement to the jury in behalf of the defendant;

Whereupon, the trial proceeded as follows: [12]

GOVERNMENT'S CASE

WILLIAM McKENZIE

called as a witness on behalf of the Government, being first duly sworn, testified as follows on

Direct Examination

By Mr. Baskin:

Q. What is your name?

A. William McKenzie.

(Testimony of William McKenzie.)

Q. Where do you reside, Mr. McKenzie?

A. I live in Juneau, Alaska.

Q. How long have you lived here in Juneau?

A. I have been around here since 1900 off and on.

Q. Are you acquainted with Kurt Gustaf Nordgren?
A. Yes.

Q. Is this Mr. Nordgren sitting over here by his counsel, Mr. Stabler?
A. That is him.

Q. Were you employed during 1948 by the Fish and Wildlife Service?
A. Yes, sir.

Q. What date were you employed by the Fish and Wildlife Service?

A. I started June 18th, and I was out at Red Fish Bay until August 21st.

Q. Is the Fish and Wildlife Service a part of the Department of Interior? [13]

A. Yes.

Q. Of the United States Government?

A. That is right.

Q. Now, you were employed on June 18th?

A. Yes, sir.

Q. That is 1948?
A. 1948.

Q. And when did you go to Red Fish Bay, Alaska?
A. It was June 22nd.

Q. 1948?
A. 1948.

Q. Now, what was your title; what was your position with the Fish and Wildlife Service?

A. Well, they call it Fishery Patrol Agent now. It used to be known as Stream Watchman.

(Testimony of William McKenzie.)

Q. It used to be known as Stream Watchman?

A. Yes.

Q. Tell the jury what your duties were in connection with your employment.

A. That was a closed area in there. When you come in there, there is a narrows there, and there is a sign up that fishing is closed from there on in; and I was to see that no one fished in that area; that was my duties.

Q. You were employed to watch Red Fish Bay?

A. Yes, sir. [14]

Q. Where is Red Fish Bay located; what island is it? A. Baranof Island.

Q. And that is in Southeastern Alaska?

A. Yes.

Q. Is that the southeastern end of Baranof Island? A. The southwest end.

Q. What part of that bay was closed to commercial fishing for salmon?

A. What they call the second narrows; there is a sign there, and from there in it is closed.

Q. From the narrows on up to the head of the bay? A. That is right.

Q. To where the stream runs into the bay?

A. Yes, sir.

Q. And you were to watch that closed area?

A. Yes, sir.

Q. Were you to report to the Fish and Wildlife Service any persons who came in that closed area and fished? A. Yes, sir.

(Testimony of William McKenzie.)

Q. Did you see the defendant—I will ask you this further question. Did you have any further instructions regarding the arrest of anybody who might——

A. No, there wasn't much said about that.

Q. About the arresting of a person who violated——

Mr. Baskin: Your Honor, I would like to put this map [15] on the board.

The Court: Can it be stipulated by counsel in this case that Red Fish Bay was a closed area?

Mr. Stabler: Yes.

Mr. Baskin: Yes.

The Court: The record may show that Red Fish Bay was a closed area.

Mr. Stabler: We stipulate that the area was open but the Bay was closed.

The Court: You mean the larger area?

Mr. Stabler: Yes; outside of these narrows, he speaks of, was open.

Mr. Baskin: That is good.

The Court: All right.

Q. Now, Mr. McKenzie, will you come down here, please? Will you point out to the jury where Red Fish Bay is situated on Baranof Island? Here is Baranof Island.

A. I don't see it very good.

Q. Let's get another map. It is too small. Now, Mr. McKenzie, I show you a map marked 28253 and ask you to point out on the map where Red Fish Bay is located.

(Testimony of William McKenzie.)

A. Here is Red Fish Bay.

Q. And that is on the south end of Baranof Island? A. That is right.

Q. Now, the narrows you mentioned a while ago, point out to [16] the jury on the map as to where the narrows, the second narrows, are situated. A. Here is the second narrows.

Q. And the stream which you mentioned you were to watch is the one that runs into the north end of Red Fish Bay; is that correct?

A. Yes.

Mr. Baskin: As I understand it, the stipulation was that the area north of the second narrows was closed to salmon fishing.

The Court: It was stipulated that whatever area was closed by regulation was closed. But it still remains to be shown on the chart approximately the line that marks the southern extremity of the closed area. As I understand from what the witness or someone said, the closed area was north of the narrows. Is that correct?

Mr. Baskin: I will bring that out.

Q. There is shown on the map what is known as the second narrows; is that correct?

A. Yes.

Q. And denoted across the north was the closed area during the fishing season of 1948?

A. That is right.

Q. But the area which is south of the second narrows was open to fishing; is that correct? [17]

A. That is correct.

(Testimony of William McKenzie.)

The Court: I think you ought to have him make a line, preferably in red, to show the line of the closed area, otherwise the jury won't know.

Q. Draw on the map, Mr. McKenzie, approximately the points across the narrows at approximately the point which was marked showing the closed area.

A. As far as I can see, there was a sign right about here.

Q. Just draw a red line across the narrows where it was closed.

The Court: From one side to the other.

Q. Let me ask you another question. Now, the area from the red line, which you drew, north was closed to commercial fishing for salmon?

A. That is right.

Q. The area south of that was open for fishing?

A. Yes.

Q. That is all; you may take the witness chair. Now, the stream that you were watching flows into that bay north of the line drawn showing the closed area; is that right? A. Yes, sir.

Q. And all of that bay north of the red line was closed to fishing for salmon?

A. That is right.

Q. Where did you reside while you were living at Red Fish Bay? [18]

A. About three hundred feet from the mouth of the creek.

Q. That is the creek that flows into the north end of the bay?

(Testimony of William McKenzie.)

A. And on the right-hand side.

Q. About what distance from the beach were you?

A. It would be probably one hundred feet.

Q. Now, did you see the defendant Kurt Nordgren on or about August 9, 1948, at Red Fish Bay?

A. Yes, sir.

Q. Will you tell the approximate time that you first saw him?

A. Well, it was after dinner, and I lay down and I slept maybe for half an hour. I woke up and heard voices on the beach. I looked out of the tent, and there was a boat between my tent and the creek right close to the beach.

Q. Did you notice the name of the boat?

A. I couldn't tell from there but I walked over to it.

Q. Did you learn the name of the boat at any time that day?

A. Yes, sir.

Q. What was the name of that boat?

A. The "Lois W."

Q. Did you see the defendant there at that time?

A. Yes, sir.

Q. Was anyone with him?

A. Yes. Them two gentlemen sitting back there was with him.

Q. The two men on the first seat over there?

A. Yes. [19]

Q. Do you know their names?

A. Yes. Their names is Harris.

(Testimony of William McKenzie.)

Q. And they were there at the time?

A. Yes.

Q. Was there any other men aboard the boat?

A. The three of them.

Q. Mr. Nordgren and the two Harris brothers?

A. Yes.

Q. Did you engage in conversation with either of them?

A. Yes. When I went up there, Nordgren spoke to me. He said something about the fish—and I don't remember just what it was—about a thousand sockeye in the mouth of the creek. He said, "Come aboard and have some coffee." I said, "No." I thought they wanted them fish, and I didn't want to have any conversation with them, and I walked up to my tent waiting to see what they would do.

Q. What did the defendant do at that time?

A. They pulled out of the bay. They left that area.

Q. Did they come back into the bay?

A. Yes. They come back about five o'clock.

Q. Is that five p.m.? A. Five p.m.

Q. On August the 9th?

A. August the 9th.

Q. What did they do then? [20]

A. They come close to the beach, and Nordgren come ashore. He come up to my tent.

Q. Was he alone? A. He was alone.

Q. Did you engage in conversation with him?

(Testimony of William McKenzie.)

A. Well, after he got up there—but I didn't feel very easy; when I saw him coming, I didn't. I made up my mind I would agree to any proposition he had to offer. I didn't have to wait long. He said, "There is no reason why you couldn't make four hundred and fifty or five hundred dollars for yourself here." So, I said, "O.K."

Q. Did you tell him whether or not you were a Fishery Patrol Agent?

A. Before he left the tent.

Q. What did you say?

A. He said, "That is a fine boat down there." I told him it belonged to the Fish and Wildlife and that they have a fancy title now on stream watchmen, that it was Fishery Patrol Agent.

Q. And did you tell him you were a stream watchman too?

A. Them are the words I used.

Q. When he asked about the boat he saw, was that a Fish and Wildlife Service boat?

A. That is right.

Q. Did the Fish and Wildlife Service leave a boat there for [21] your use?

A. That is right.

Q. Was it an ordinary boat or a skiff?

A. One of the outboard boats that you could put an engine on, but I didn't have an engine at that time.

Q. About how long was the boat?

A. Probably twelve feet long.

(Testimony of William McKenzie.)

Q. Is it ordinarily referred to as a skiff, something like that?

A. Not exactly. My understanding is that a skiff is something you pull aboard another boat and use to go ashore. This was for an outboard motor, kind of a speed boat when the motor is on. It is not good for rowing.

Q. You didn't have a motor?

A. That is right.

Q. And the boat was about twelve feet long?

A. Yes.

Q. Did he say anything else to you then?

A. He asked me to go aboard the boat and have supper with him. I told him, "No." He said, "We are going to have pork chops." I refused again. He said, "We have beer down there." I told him no, that it was raining and I didn't want to go out and get wet. He said, "A little rain won't hurt you." I told him, "If it lets up raining, I might go down later on." [22]

Q. Did he say whether or not he would give you a share of any fish he caught there or the money?

A. Yes.

Q. What did he say in that regard?

A. After he said that about the four or five hundred dollars, he said, "We will give you a share." That is all that was said about it that I remember now.

Q. Did he say when he would do the fishing out there?

(Testimony of William McKenzie.)

A. Yes. He said, "We will fish mostly at night."

Q. After this conversation, what did Nordgren do?

A. Then he invited me to go aboard the boat.

Q. Who was present when you had that conversation? A. Just him and I.

Q. No one else was there?

A. No one else.

Q. Where were the Harris brothers?

A. They were aboard the boat.

Q. Did Nordgren leave your tent, or what did he do?

A. He got his skiff and rowed back to the "Lois W."

Q. How long did they remain in the bay at that time?

A. An hour and a half; two hours; something like that.

Q. Did they leave the bay that day or night?

A. That evening they left the bay.

Q. What time would you say they left?

A. I would say seven o'clock. I wouldn't be positive of the [23] exact time.

Q. When was the next time that you saw him?

Whereupon, the jury was duly admonished and Court recessed until 2:00 o'clock p.m., April 18, 1949, reconvening as per recess, with all parties present as heretofore and the jury all present in the box; whereupon the trial proceeded as follows:

(Testimony of William McKenzie.)

Mr. Baskin: Your Honor, at this time I would like to ask that all witnesses be put under the rule and be excluded from the courtroom.

The Court: All witnesses in this case will not be permitted in the courtroom until ordered to testify. The attorneys for each party will see that they are so excused.

Whereupon, the witness William McKenzie resumed the witness stand and the Direct Examination by Mr. Baskin was continued as follows:

Q. Now, Mr. McKenzie, when did you say you went to Red Fish Bay?

A. I landed there June 22nd.

Q. 1948? A. 1948.

Q. Did you go out there alone? How did you go out there?

A. I went out on a boat called the "Redwing."

Q. Is that a Fish and Wildlife Service boat?

A. Yes, sir. [24]

Q. Did you remain out there alone?

A. Yes, sir.

Q. No other Fish and Wildlife Service agent or patrolman was out there with you? A. No.

Q. How often did Fish and Wildlife Service agents see you or call on you at Red Fish Bay?

A. Once in every two weeks; they made a trip every two weeks.

Q. With reference to August 9, 1948, when was the last time a Fish and Wildlife Service boat was out at Red Fish Bay and called on you?

(Testimony of William McKenzie.)

A. The last time they were there?

Q. Yes, with reference to August 9, on or about that date.

A. The 21st of August; I believe it was Saturday. I have a calendar——

Q. I don't believe you understood my question. After June 23rd, how many times did Fish and Wildlife Service boats go into Red Fish Bay?

A. I will have to check on that. It was nineteen days before a boat showed up first.

Q. With reference to the date of August 9th, when was the last boat in there with reference to that date, any time prior to August the 9th?

A. You mean the next boat that come after that?

Q. Yes. [25]

The Court: Not after?

Q. Before August the 9th when was the last boat in there?

A. I will have to check on that. Well, I haven't got the rest of the calendar, but it was two weeks before that date.

Q. You mean on August the 9th there hadn't been a Fish and Wildlife Service boat in Red Fish Bay within the last two weeks?

A. That is right.

Q. All right. Did you have any kind or means of communication out there? A. No.

Q. Did you have any means of travel other than that one boat that you had?

A. No, I didn't.

(Testimony of William McKenzie.)

Q. And it didn't have a motor, I believe you said, or you didn't have a motor for that boat?

A. The first part of the season I was out there I didn't have no motor, but I think the trip before that they brought one out to me.

Q. On August 9th state whether or not you had a motor there?

A. Yes, there was a motor there.

Q. That was a small outboard motor?

A. Yes.

Q. What size engine was it? [26]

A. I think it would be a two and a half horsepower, something like that; but I couldn't start it.

Q. Now, will you tell the jury again, as near as you can, what you understood your duties were out at Red Fish Bay?

A. I was to see that no one took any fish out of that stream there, and report anyone fishing in that closed area.

Q. Were you to see that no one took any fish out of the bay, that part of the bay that was closed?

A. Yes, sir.

Q. As well as that stream that flows into the bay?

A. Yes, sir.

Q. After the date of August 9, 1948, when was the next time that you saw Kurt Nordgren?

A. That would be on the 12th of August.

Q. About what time of the day would you say that was?

A. About four o'clock.

Q. At four p.m.?

A. Four p.m.

(Testimony of William McKenzie.)

Q. And where was he when you saw him?

A. Well, the boat come in about that time, and they anchored in front of the place there. He come up to my tent shortly after.

Q. You mentioned "the boat." What boat was that?

A. The "Lois W."

Q. And who was on the boat? [27]

A. Kurt Nordgren and the Harris boys.

Q. And they anchored there?

A. In front of my tent.

Q. In front of your tent. Mr. McKenzie, will you come down and show on the map about where your tent was located? Now, with reference to the bay—that is, the closed area of Red Fish Bay—make a little mark about where your tent was located.

A. I can't see. But there was a platform where an old cannery was, and I had my tent on that platform.

Q. Make a little "x" mark there.

A. Here?

Q. No. Where your tent was located. That is good enough. You may be seated. And when you saw them, where were you?

A. I was sitting in front of my tent. There is two big trees there, and a plank in between them, and I was sitting on that plank.

Q. What did Mr. Nordgren do when you saw him?

A. Well, he come up and he said, "We had a

(Testimony of William McKenzie.)

long run. We ran all the way to Petersburg.” He says, “We didn’t want to sell the fish around the point for they would know where the fish come from.” And he handed me what he said was a fish sales slip. I didn’t have no reading glasses on, and so I could not read it, and so I handed it to him back. He said, “We are giving you one-sixth,” and pulled out two [28] one-hundred-dollar bills and gave them to me.

Q. Now, who was present at that time?

A. Just him and I.

Q. And you were up near your tent?

A. Yes.

Q. Did he say anything to you about fishing at a later time in the bay and paying you anything for fishing in the bay?

A. Well, no, not exactly, but he said or asked me, “What is your post-office box in Juneau?” and I told him. “Well,” he says, “after we make the last trip we will send you a post-office money order for the rest of it.”

Q. Now, when he showed you a slip which you said was a fish slip, could you read that?

A. Now, I couldn’t read it.

Q. You don’t know what was stated on the fish slip then? A. No, I don’t.

Q. What did you do with it?

A. I handed it back to him.

Q. Did he take it? A. Yes.

Q. You don’t know what happened to it after that? A. No, I don’t.

(Testimony of William McKenzie.)

Q. And he gave you two one-hundred-dollar bills? A. Yes, sir.

Mr. Baskin: If the Court please, I would like to have [29] them marked for identification.

The Court: Well, why not have the Clerk take their numbers?

Mr. Baskin: That is what I am going to do, the numbers of the two one-hundred-dollar bills.

The Court: You can just state the numbers for the record.

The Clerk of the Court: L 07021621 A.

The Court: What is it, a treasury note or a national bank note?

Mr. Baskin: It is a federal reserve note.

The Court: Then it should also have that.

Mr. Baskin: And then Federal Reserve Note No. L 06995997 A.

Q. Mr. McKenzie, I show you Federal Reserve Note No. L 07021621 A, and ask you if you have seen that Federal Reserve Note before?

A. Yes. I have got the numbers of it down here.

Q. Now, tell the jury whether or not that Federal Reserve Note is one that was given you by Kurt Nordgren on or about August 12, 1948?

A. Yes, this is one of the bills that was given me.

Q. And was that given you at Red Fish Bay near your tent on that day? A. Yes, sir.

Q. Now, I show you Federal Reserve Note No. L 06995997 A, and ask you if you have seen that note before?

(Testimony of William McKenzie.)

A. Yes. Yes, that is the other one.

Q. Tell the jury if Kurt Nordgren gave that Federal Reserve Note to you on or about August 12, 1948, at Red Fish Bay, Alaska?

A. He come ashore, and I stated the other before, that after I returned the slip to him he handed me these two bills.

Q. And that is one of them; that last one you mentioned here is Federal Reserve Note No. L 06995997 A? A. Yes.

Q. They were both given to you at the same time? A. That is right.

Mr. Baskin: If the Court please, we would like—no, not right now.

The Court: Why don't you offer them in evidence now?

Mr. Baskin: Very well. We would like to offer the bills in evidence and let the jury examine them.

The Court: Well, they may be received and marked Plaintiff's Exhibit No. 1.

The Clerk of the Court: The exhibits have been put in an envelope marked Plaintiff's Exhibit No. 1.

The Court: You may show them to the jury so that the exhibits will not need to be taken into the jury room.

Whereupon, the bills were exhibited to the jury.

Q. Now, after Kurt Nordgren gave you the two one-hundred-dollar bills, what did he say?

A. He says, "We are giving you one-sixth. We sold \$1200.00 worth of fish." And then he asked

(Testimony of William McKenzie.)

me about my post-office box number, and I told him, and he says, "After the last trip we will send you the rest of the money."

Q. Now, have you received any other money from him? A. No.

Q. Did you ever get any out of your post-office box? A. No.

Q. That is, after the date of August 12, 1948—which you believe or understood to have come from Kurt Nordgren?

A. Would you repeat that please?

Q. Did you receive any money through your post-office box after August 12, 1948, which you believe to have come from or was sent by Kurt Nordgren?

A. No, I didn't receive any money at all.

Q. What did he do after that time?

A. Well, I don't remember the rest of the conversation, but he went back aboard the "Lois W" shortly after.

Q. Did he go alone? A. Yes.

Q. Did they pull anchor and leave, or what did they do?

A. No. Later in the evening I was down on the beach, and he called to me to come aboard, so he took his skiff and come [32] ashore, and I went aboard the boat with them, and then I was treated to a drink of whiskey, two stubbys of beer, and we had lunch. After lunch I was asked how I was fixed for grub. I told them, "Not very good," so

(Testimony of William McKenzie.)

they gave me a can of chicken stew, a can of corned beef, a jar of jam, and enough pork sausage to make a meal. So, shortly after that they put me ashore.

Q. Now, how long were you on his boat?

A. Probably an hour.

Q. Did they remain in the bay all that evening?

A. No. No; they put me ashore and they pulled out—oh, it was around seven or eight o'clock, something like that. I don't remember the exact time they pulled out, but they pulled out that evening.

Q. Then, they were anchored in the bay some three or four hours on the evening of August the 12th?

A. That is right.

Q. Did you see them again that evening of August the 12th?

A. No, I didn't see them.

Q. When was the next time you saw him; when was the next time you saw the defendant Nordgren?

A. It would be Sunday morning, the 15th of August.

Q. What time was that?

A. That would be five o'clock in the morning.

Q. Where was Nordgren at the time you first saw him? [33]

A. They were at the mouth of the creek.

Q. Was he on his boat?

A. Yes. They were making a haul.

Q. Was he on the "Lois W"?

A. Yes.

Q. You say, "they;" who are you speaking of?

(Testimony of William McKenzie.)

A. The two Harris boys and him.

Q. And Nordgren? A. Yes.

Q. You say, "they were making a haul;" what do you mean by that?

A. They had a purse seine—I guess you call it—and made a small circle around the mouth of the creek. They brailed up eleven brails of salmon. The last one wasn't quite full.

Q. And that was near the mouth of the creek that flows into the Red Fish Bay?

A. That is right.

Q. And that was in the part of the bay that was closed to salmon fishing? A. Yes.

Q. And you could see Nordgren during that time?

A. Yes. I was pretty close to them. I was probably less than fifty-sixty feet from them.

Q. And you identified both him and the Harris brothers? A. Yes. [34]

Q. What time did they finish that fishing operation?

A. It didn't take them very long that morning. As soon as they picked up the fish and net, they pulled out.

Q. Did you engage in conversation with them that morning? A. No. No.

Q. When did you see them again?

A. It was Monday morning, the 16th. I heard them first on the left-hand side of the tent. There was a plank there and, just as they come over and

(Testimony of William McKenzie.)

started to make a set, one man made a sound there, and the net was pretty near spread out by my tent and made a semicircle. The net got caught, and the fish got away, and there was no fish when they picked up the net.

Q. You say, "they;" who are you speaking about when you say, "they"?

A. Nordgren and the two Harris boys.

Q. Were they fishing with the boat "Lois W" at the time? A. Yes, sir.

Q. Now, did you have any conversation with them? A. No.

Q. At that time? A. Not at that time.

Q. Did they remain in the bay that day?

A. No. They pulled out.

Q. Did you see them at any other time after that? [35] A. Yes.

Q. When was it; when did you see them?

A. They came back at probably five o'clock, and I was down on the beach, and they invited me again to go aboard, so Nordgren came ashore with his boat, and I went aboard with him. He went down into the cabin and took up a bottle of whiskey. We sat on the deck, and I had three drinks of whiskey. The salmon were jumping pretty good. He said they were going to make a haul. They had salmon. I asked if I could have a salmon. He said, "Sure." He said, "They only cost about a dollar." So, I went ashore.

Q. Did he talk with you or say anything to you

(Testimony of William McKenzie.)

about what you should do while he was fishing out there? A. Yes.

Q. What did he say?

A. He said, "You shouldn't sit on the beach, while we are making a haul, that way. Go back up in the woods. Someone might come and see you sitting there, and it might be a good idea for you to put the fire out when you go back in the woods."

Q. What fire was he speaking of?

A. The fire in my tent.

Q. Was there smoke coming from that fire at the time?

A. I didn't notice at the time.

Q. Did they do any fishing after they put you ashore? [36]

A. Yes. They made another set at the mouth. This time the web got cut on the rudder, and they only got fifteen or twenty fish.

Q. And you observed them fishing there?

A. Yes.

Q. Did they fish with their seine net and out of their boat the "Lois W"? A. Yes.

Q. And you are speaking of Mr. Nordgren and the Harris brothers when you say "they"?

A. Yes; that is correct.

Q. What time did they leave the bay—that is, Red Fish Bay—that day?

A. After they made that haul; it must have been after seven o'clock or around that time.

Q. Did you see them at any time after that?

(Testimony of William McKenzie.)

A. That was the last time I saw them.

Q. You told the jury this morning, I believe, that you informed Mr. Nordgren that you were a Fishery Patrol Agent? . . . A. Yes.

Q. When he first approached you on August the 9th?

A. Not when he first approached me, but after he come to my tent; that is in the afternoon when he come up to the tent and made the arrangements with me and spoke about the nice boat I had on the beach, and then I told him about that I [37] had a nice title to my job now—I was Fishery Patrol Agent. So, that was about the extent of it.

Q. Who paid your salary while you were working out at Red Fish Bay from June 23, 1948, until August 22, 1948?

A. The Fish and Wildlife.

Q. The Fish and Wildlife Service?

A. Yes.

Q. And were you paid by Government checks?

A. Yes.

Q. Now, how long after August 16, 1948, did you remain at Red Fish Bay?

A. I was there until the 21st of August.

Q. 1948? . . . A. 1948.

Q. And who did you see on that day? Did anyone come into the bay?

A. The boat—I think it is called “Scouter.” It makes regular trips.

Q. Would that be the “Scoter”?

(Testimony of William McKenzie.)

A. Yes. I seen them coming and I was pretty near all ready to pull out when they got there. The boy came ashore—the deckhand—and helped me put my stuff in the boat and went out to the “Scoter.” I didn’t have much—tent, bed, stove and a little grub left, just my personal stuff that way.

Q. And you left—did you put that property aboard the boat [38] “Scoter”?

A. Yes; that is right.

Q. And did you leave the bay? A. Yes.

Q. At that time, or did you remain there?

A. Yes—the captain wanted to get to another bay near Sitka. Somebody was fishing there, and he thought probably he could catch them, and we stayed there all night.

Q. Before we got further—who did you see when you got aboard the boat “Scoter”?

A. The captain of the boat.

Q. Do you know his name?

A. If I heard it.

Q. Do you know whether it is Harndin?

A. That seems like it; and there was an engineer on the boat and cook and deckhand—four men.

Q. Did you talk with Mr. Harndin?

A. Yes. As soon as the other boys left the deck, I told him, and I am pretty sure I showed Harndin the money, and he told me——

Mr. Stabler: We object to what he told him.

(Testimony of William McKenzie.)

Q. Did you show Mr. Harndin the two one-hundred-dollar bills given you by Kurt Nordgren?

A. Yes.

Q. And did you tell him how you got the money?

A. Yes.

Q. What did you say to him?

A. Well, I told him about the "Lois W" crew bribing me, giving me the money. There wasn't much said. Some of the crew come back on deck. He told me not to say anything before the crew. Not much was said about it. He told me to turn the money over to Hillsinger, the Fish and Wildlife Agent.

Q. Did you go to Sitka after you left Red Fish Bay on the "Scoter"?

A. Yes. We got in there in the evening.

Q. Of what day was that?

A. I will have to look again. That would be Sunday evening, the 22nd.

Q. Sunday evening, August 22, 1948?

A. Yes.

Q. And you went from Red Fish Bay to Sitka on the boat "Scoter," did you not? A. Yes.

Q. After getting in Sitka did you talk with one Gomer S. Hillsinger? A. Yes.

Q. Who is he? What position did he occupy, if any, if you know?

A. He is the agent for the Fish and Wildlife, agent at Sitka. [40]

Q. You mean Fish and Wildlife Agent for the Service? A. Yes.

(Testimony of William McKenzie.)

Q. Where did you see him?

A. I went up to his office. Nobody was there. The place was locked. I come back down and ran into him on the street, so we went back to his office then, and we talked about what happened.

Mr. Stabler: We object to what he said—calling for hearsay.

The Court: Yes.

Q. Where did you first approach him? Where was he when you first approached him?

A. He was on the street in front of a cocktail bar.

Q. Did you go to the office after you first saw him? A. Yes.

Q. Did he go with you? A. Yes.

Q. That is, to the Fish and Wildlife Service Office? A. That is right.

Q. Did you show him the two one-hundred-dollar bills? A. Yes.

Q. And did you tell him how you got the money?

A. Yes.

Q. Did you tell him substantially what you have already testified to? [41] A. I did.

Q. And what did you do with the two one-hundred-dollar bills? A. Well, he said—

Mr. Stabler: We object to what Hillsinger said.

Q. Yes. Just tell what you did.

A. I gave them to Hillsinger and asked for a receipt. He said, "How would an affidavit do"? So, he gave me an affidavit.

(Testimony of William McKenzie.)

Q. And that was the money you examined a while ago and was shown to the jury?

A. Yes, that is right.

Q. How old are you, Mr. McKenzie?

A. I was born July 12, 1885.

Q. What is your approximate age at this time?

A. It will be sixty-four next July.

Mr. Baskin: You may cross-examine the witness.

Cross-Examination

By Mr. Stabler:

Q. Mr. McKenzie, is this the first time you have worked for the Bureau of Fisheries or the Fish and Wildlife, as you call it? A. Yes.

Q. This was the first season that you ever had a job with them? [42]

A. That is right.

Q. Had you been trying to get a job with them before?

A. I did try several years ago when the depression was on.

Q. So you tried again last year?

A. I put my application in for a position.

Q. And they gave you a job last year?

A. That is right.

Q. Did you have any commission of any kind from them?

A. Well, I was appointed Fishery Patrol Agent.

Q. Did you have any commission of any kind?

A. I don't know just what you mean by that.

Q. Did you have any written commission or anything of that kind?

(Testimony of William McKenzie.)

A. Yes; they gave me papers.

Q. Who gave them to you?

A. Miss O'Neill.

Q. Did she appoint you?

A. Well, she swore me in.

Q. Well, did she appoint you?

A. Dan Ralston hired me, and they sent me in to her office there to get signed up.

Q. What is Dan Ralston's position?

A. Why, I think he is head Enforcement Officer.

Q. What is his title?

A. Well, I think that is his title—Law Enforcement Officer for the Wildlife. [43]

Q. Law Enforcing Officer?

A. As far as I know.

Q. He is not the Director is he? A. No.

Mr. Bailey: We object, your Honor. I don't see what that has to do with it—his title or anything else.

The Court: Well, it is cross-examination.

Q. Now, you were designated as what—stream watchman, or what?

A. Fishery Patrol Agent.

Q. That was formerly called stream watchman?

A. That is right.

Q. And your job was to watch that stream?

A. That is right.

Q. No place else?

A. The rest of the bay around there where it was closed.

(Testimony of William McKenzie.)

Q. How much did you get for that?

A. Well, let's see——

Mr. Baskin: Your Honor, I don't think the salary he made in this employment is material.

The Court: It doesn't sound material to me.

Mr. Stabler: It may be very material. Besides it is cross-examination.

The Court: How could it be material?

Mr. Stabler: If the Court wants me to state in the presence of this jury, I will. [44]

The Court: You better state it.

Mr. Stabler: If he gets a salary, it might depend on what he got, or whether he would do what he says he did there.

The Court: Objection sustained.

Q. You worked from June 22nd to August 22nd; is that right? A. That is right.

Q. They put you out there—I think you said this place where you marked right here with the red “x”—clear up there at the head of the bay; is that right? A. That is right.

Q. What kind of a place was it? Describe it briefly.

A. There was an old cannery there at one time. There was nothing left but the foundation. I spread my tent on that foundation. It is right at the edge of the woods there.

Q. There is timber all around there?

A. That is right.

Q. And mountings? A. That is right.

(Testimony of William McKenzie.)

Q. You were all by yourself there?

A. Yes, that is right.

Q. In a tent? A. Yes.

Q. Were you fearful of any wild animals or anything of that kind? A. Yes. [45]

Q. You were quite fearful of bears and things of that kind?

The Court: How is that material?

Mr. Baskin: We object to that as not material to the case.

Q. But you were afraid, weren't you?

Mr. Baskin: We object to that.

The Court: Objection sustained.

Q. When is the first time you saw Mr. Nordgren?

A. August the 9th along about two o'clock in the afternoon, I think it was.

Q. After dinner, you said? A. Yes.

Q. Do you call the noonday meal dinner?

A. Yes.

Q. You heard some voices out there?

A. That is right.

Q. And you went out and saw a boat between the tent and the creek? A. Yes.

Q. And you said that was the "Lois W"?

A. That is right.

Q. Then you saw three men there—Mr. Nordgren and the two Harris brothers; did you know these men? A. No.

Q. Now, you say that Mr. Nordgren invited you aboard for [46] coffee?

(Testimony of William McKenzie.)

A. That is right.

Q. Did you go aboard? A. No.

Q. So you just thought they wanted some fish there; that is what you said?

A. That is what it looked like to me.

Q. But they didn't talk about fishing?

A. Yes, they talked about fishing, yes.

Q. They didn't make any effort to take any fish? A. No.

Q. And they pulled out of the area?

A. Within about fifteen minutes.

Q. And came back about five o'clock in the evening? A. Yes.

Q. That is August 9th you are talking about?

A. That is right.

Q. You said Mr. Nordgren came to your tent alone, by himself; that was about five o'clock in the evening? A. Correct.

Q. You said you didn't feel very easy; what did you mean by that?

A. They are three great big husky guys and they wanted them fish.

Q. Did they say so? [47]

A. He didn't use them words.

Q. That is what you thought? He didn't say he was going to take any fish?

A. He said, "There is no reason why you can't make four hundred and fifty or five hundred dollars for yourself here."

Q. What did you say to that?

(Testimony of William McKenzie.)

A. When I seen him coming up the hill that time, I was afraid and I was going to agree with any proposition he would make until I got away from there.

Q. And you were afraid of Mr. Nordgren and these two men? A. That is right.

Q. And you would agree to any proposition they might make because you were afraid?

A. It was better to let them have the fish than put a rock around my neck and sink me in the bay.

Q. They threatened to do that? A. No.

Q. That is what you were afraid of?

A. That is right.

Q. Now, you talked about your boat up there?

A. Yes.

Q. And you told him that you had no engine for the boat?

A. I don't remember all the conversation about it.

Q. He asked you to go aboard for dinner? [48]

A. Yes.

Q. And he said he had some pork chops and some beer? A. That is right.

Q. But you didn't go because you were afraid of them? A. That is right.

Q. You didn't see any of those men take any fish on August 9th, did you? A. No.

Q. As a matter of fact you didn't see them again at all until—when was it you saw them again?

A. It was the 12th of August, the next time I saw them.

(Testimony of William McKenzie.)

Q. The 12th of August was the next time you saw them. They came in on the 9th and invited you aboard the boat for dinner, and you were afraid of them, afraid they would put a rock around your neck and throw you overboard, and that is why you didn't go aboard?

A. That is more or less right.

Q. So they went out of there, and they didn't take any fish, and they didn't come back until the 12th, three days later?

A. That is right.

Q. And at that time you say Mr. Nordgren came in and gave you two one-hundred-dollar bills?

A. That is right.

Q. Now, you said here this morning on your direct examination that this money was for a one-sixth share of fish that they [49] had caught?

A. That is what they told me, that they were giving me some.

Q. For fish caught before the 12th?

A. They made a run into Petersburg and sold \$1200.00 worth of fish according to what he told me.

A. As far as you know they didn't catch any fish where you were?

A. I didn't see them fish that evening.

Q. These two one-hundred-dollar bills was for fish already caught and that was your one-sixth?

A. Yes.

Q. So you took the two one-hundred-dollar bills?

A. Yes.

Q. That was agreeable to you?

A. Yes.

(Testimony of William McKenzie.)

Q. Were you still afraid of them?

A. No. After they gave me the money I wasn't afraid of them any more.

Q. What changed your mind?

A. When I accepted the money, everything seemed to be quite friendly.

Q. Everything was all right when you took the money? A. Yes.

Q. That is the time you went out on the boat?

A. Yes. [50]

Q. And drank whiskey with them?

A. That is right.

Q. And beer with them?

A. That is right.

Q. And had dinner with them?

A. That is right.

Q. But you weren't afraid of them then?

A. That is right.

Q. When you got the money you got over your fright?

A. There is some truth in what you say.

Q. Did you see any other boats around there at that time?

A. No. What time do you mean?

Q. At that time or any time up to the 21st?

A. There were several boats in there.

Mr. Baskin: Your Honor, we object to any further questions along that line. It is not material.

The Court: What is the question?

(Testimony of William McKenzie.)

Mr. Stabler: If he saw any other boats in there. I want to see if he is sure about this boat, the "Lois W."

The Court: Objection sustained. You can question him about how sure he is about the "Lois W."

Q. I want to ask you directly whether or not you met anybody else in there?

Mr. Baskin: We object to that. Any examination about anybody else in there has nothing to do with this case. [51]

Mr. Stabler: I mean to ask directly if anybody else offered him money in there.

The Court: Objection sustained. If it were true, it certainly wouldn't be relevant to this case. Objection sustained.

Mr. Stabler: We take an exception to that. We would like to bring out the fact here that he did.

Mr. Baskin: We object to counsel reciting what he wants to bring out.

The Court: Yes, in the presence of the jury.

Mr. Stabler: I would like to make that statement in the absence of the jury.

The Court: From what you said, I ruled that the objection was sustained. If you want to make an offer further, you can make it in writing. I am not going to excuse the jury for that.

Mr. Stabler: I will make that in writing here before we get through.

The Court: Very well.

Mr. Stabler: We take an exception to the ruling too.

(Testimony of William McKenzie.)

Q. Now, on August the 12th Mr. Nordgren went back on the "Lois W" after he gave you this money? A. Yes.

Q. And it was later in the evening then that he called you to come aboard? [52]

A. That is right.

Q. And that is the time he gave you a drink of whiskey?

A. Three drinks of whiskey?

Q. Three drinks of whiskey?

A. Let me see—the 12th, a drink of whiskey and three bottles of beer.

Q. One drink of whiskey?

A. One drink of whiskey and two bottles of beer.

Q. And two bottles of beer; and you had lunch on the boat, didn't you? A. That is right.

Q. And is that the time they gave you the grub?

A. That is right.

Q. Did you ask them for grub?

A. No.

Q. Did you tell them you were out of grub?

A. No.

Q. So, you were on the boat at that time?

A. Yes.

Q. Everything was lovely?

A. Yes; everything was O.K.

Q. Now, you say that Nordgren and his crew made a set within fifty or sixty feet from you?

A. That is right.

(Testimony of William McKenzie.)

Q. And pulled out without any conversation at all? [53]

A. I don't think they knew I was on the beach there.

Q. That was the 12th?

A. No. That was Sunday morning, the 15th, they made the set.

Q. Did they make a set on the 12th?

A. I don't know. I didn't see them.

Q. You didn't see any set made on the 9th or on the 12th? A. No.

Q. Now, then they just gave you this money and pulled out; is that right? A. Yes.

Q. And you didn't see them again until August 15th? A. Yes, that is right.

Q. That was Sunday? A. Yes.

Q. And at that time it was about five o'clock in the morning? A. Yes.

Q. Were you up at that time?

A. I heard some noise on the beach and I got up.

Q. Did they come ashore? A. No.

Q. Did you talk to them? A. No.

Q. You saw somebody make a set out there?

A. Yes.

Q. Your eyesight is not very good, is it? [54]

A. Not too good.

Q. But you think it was the "Lois W"?

A. Yes.

Q. And that was Sunday, August the 15th?

A. That is right.

(Testimony of William McKenzie.)

Q. How long was that boat around there?

A. That morning of the 15th?

Q. Yes, sir.

A. It was there when I got up at five o'clock, and I don't think it was there much over an hour.

Q. And you didn't talk with them?

A. No.

Q. And they pulled out?

A. That is right.

Q. Do you know whether any fish was taken at that time? A. Yes.

Q. How many fish?

A. They got a brailer, and I don't know exactly how much it will hold. They had that filled eleven times. The last time it wasn't quite full.

Q. That was on Sunday?

A. Sunday, the 15th.

Q. That was a load, wasn't it? A. Sir?

Q. Was that a load? [55]

A. I don't know.

Q. So, they pulled out? Left? When was the next time you saw them?

A. Monday, the 16th.

Q. Did you talk with them? A. Yes.

Q. You said you got up and heard a boat out there but didn't see them; they started to make a set, and the web caught. When did you talk with them? A. In the evening.

Q. When was this set made?

A. They made the set in the morning; probably six o'clock they made that set.

(Testimony of William McKenzie.)

Q. And they just went out some place and came back in the evening, the same as before only they didn't come back in the evening the day before?

A. That is right.

Q. When they came back Monday evening, that was about five o'clock, wasn't it?

A. About that time.

Q. They invited you aboard, you say?

A. Yes.

Q. This is the time you went aboard the boat, the "Lois W.," the second time, isn't it?

A. That is right. [56]

Q. You talked with Mr. Nordgren that time?

A. That is right.

Q. The only two times you talked with Mr. Nordgren was on the 9th and on the 16th; is that right?

A. That is right.

Q. This is the time you——

A. The 12th, I talked to him the 12th too.

Q. Excuse me. That is right. That is the time he gave you \$200.00 for fish to be caught in the future or that had been caught, and you say one-sixth was your share. So, you talked with him on the 9th and the 12th, and you didn't talk with him again until the 16th, Monday?

A. That is right.

Q. Now, on the 16th about five o'clock in the evening, that is when you went aboard the second time?

A. That is right.

Q. That is the time you had three drinks of whiskey?

A. That is right.

(Testimony of William McKenzie.)

Q. That is the time you asked them for a salmon too, didn't you? A. That is right.

Q. You asked them? They didn't ask you to take one? A. That is right.

Q. Is that one of the salmon that was caught there?

A. I don't know where they caught it. [57]

Q. Was this salmon taken out of the ice?

A. Yes. They had ice aboard, and the salmon was cold.

Q. The salmon they gave you they went down and took out of the ice?

A. They went down and got it below deck.

Q. That is all that happened; they went away after that, didn't they? A. Yes.

Q. And the next thing is when the "Scoter" came on the 21st? A. Yes.

Q. And you went over and reported. You got the money on the 12th and reported it on the 21st?

A. No; it was the 22nd, I am pretty sure. I have a diary. It was the 22nd.

Q. That is the time you told the captain, Harndin, that the "Lois" crew had bribed you?

A. No; that was the 21st.

Q. Oh; the 21st. So you didn't do anything about this from the 12th to the 21st? A. No.

Q. In the meantime you had got your motor for your power boat, hadn't you?

A. I think I got that before that.

Q. So that you were loading up your own boat to pull out of there when the "Scoter" came in?

(Testimony of William McKenzie.)

A. No. I was tearing my tent down and getting my stuff ready to go aboard the "Scoter."

Q. Now, on the 9th of August you say that this proposition was for you to share one-sixth?

A. No. There was nothing said about what I would share. They told me they would give me a share.

Q. And you were afraid if you didn't agree to the proposition that they would tie a rock around your neck and throw you overboard?

A. That is right.

Q. Did you agree to the proposition?

A. Yes.

Q. So that on the 9th you did agree to the proposition, you say?

Mr. Bailey: Your Honor, we object to this. He has been into this twice, three times.

The Court: It is repetitious.

Mr. Stabler: There is one thing I overlooked there.

The Court: You may ask it.

Q. Did you say you didn't want to go aboard the boat on the 9th because it was raining too much?

A. That is what I told Mr. Nordgren.

Q. You told him you would think about it later?

A. Yes.

Q. And you had made up your mind to go through with the proposition, [59] is that right?

A. Yes.

Q. I think you said you had defective vision?

(Testimony of William McKenzie.)

A. Yes, that is right.

Q. This salmon that they gave you, did you take it ashore? A. Yes, sir.

Q. Did you eat it? A. Yes, sir.

Q. When you drank the three drinks of whiskey and the beer, did you get intoxicated?

A. Well, I don't think so.

Mr. Stabler: I would like to renew my motion on that, if the Court please, and I would like to reduce to writing what I would like to bring out. It will be just a second.

The Court: Very well; or you may approach the bench. Counsel may approach the bench.

Mr. Stabler: Yes. I just want to ask a question or two first.

Q. Now, a charge was made against these three men at Sitka——

Mr. Baskin: Your Honor, I am going to object to him asking anything that was done at Sitka. That is not material.

The Court: That is the way it seems to me, unless this is preliminary to something that is material.

Mr. Stabler: I think it is material because the Court will have to instruct the jury that this case is not to find the men guilty of illegal fishing or consider that, only so [60] far as it pertains to this particular case.

The Court: The Court usually instructs the jury not to consider any previous convictions or any-

(Testimony of William McKenzie.)

thing else that comes out in the evidence—you don't mean to tell me you want to bring it out in evidence for the purpose of asking for an instruction on that?

Mr. Stabler: I want to bring it out to show what happened.

The Court: I don't believe it has anything to do with the case.

Mr. Stabler: I would like to renew my motion.

The Court: You may approach the bench.

Whereupon, Mr. Baskin, Mr. Stabler and the court reporter approach the bench, out of hearing of the jury, and the following took place:

Mr. Stabler: I would like to bring out from this witness his testimony on the trial of the fisheries case at Sitka, that the "Vivian June" came in there on the 13th of August and the boat "Nightingale" and also the "Paddy," the three boats—"Vivian June" and "Nightingale" and "Paddy"—and some of the men offered him money and were friends of him, for the purpose of showing he was mistaken as to who gave him the money.

The Court: Objection is sustained as to that.

Whereupon, Mr. Baskin, Mr. Stabler and the court [61] reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows:

(Testimony of William McKenzie.)

Redirect Examination

By Mr. Baskin:

Q. Mr. McKenzie, you stated you took the money from Kurt Nordgren, the two one-hundred-dollar bills; tell the jury why you accepted that money.

A. I was afraid if I didn't agree to what they wanted—they wanted the fish—I didn't think them fellows would stop for anything. I accepted the proposition. I thought probably they would sink me in the bay. I took the money and tried to get along until I could get away from there.

Q. You testified on cross-examination that your vision is somewhat defective? A. Yes.

Q. Is that vision corrected, while wearing glasses, to a certain extent? A. Not quite.

Q. But regarding August 15th, you stated that you saw Nordgren fishing, I believe on August 15th, did you not? A. Yes.

Q. That was early in the morning?

A. Yes.

Q. Did you recognize Nordgren as being one of the fishermen [62] there on that occasion?

A. That is right.

Q. And the two Harris brothers?

A. That is right.

Q. Now, you testified that you received the \$200.00 on August 12, 1948, and you reported it first on August the 21st; is that correct?

A. That is correct.

Q. Now, tell the jury if that was the first oppor-

(Testimony of William McKenzie.)

tunity you had to report that to any Fish and Wildlife Service Agent? A. Yes.

Q. Or any other law enforcement officer?

A. There was no other law enforcement officer around there. That was the only law enforcement officer that come out there was on that boat. That was the first chance I had, and I wasn't long on that boat before I reported it to him.

Q. And I believe you testified that you agreed to their proposition; the proposition that Nordgren offered you, that was. What did you say to him when you agreed to accept that money?

A. I just said, "O.K."

Q. Is that all you said? A. Yes.

Q. And you agreed to his proposition because that you were afraid you might be harmed if you didn't; is that correct? [63]

A. That is correct.

Mr. Baskin: That is all, I believe.

Mr. Stabler: That is all.

(Witness excused.)

MILTON FRANK HARNDIN

called as a witness on behalf of the Government, being first duly sworn, testified as follows on:

Direct Examination

By Mr. Baskin:

Q. What is your full name?

(Testimony of Milton Frank Harndin.)

A. Milton Frank Harndin.

Q. Where do you reside?

A. I reside at Sitka.

Q. Who are you employed by?

A. Fish and Wildlife Service.

Q. What is your position with the Fish and Wildlife Service? A. I am ship's master.

Q. Are you the captain of a boat?

A. Yes, I am.

Q. What boat is it that you are captain of?

A. The Fish and Wildlife Service "Scoter."

Q. That is a Fish and Wildlife Service boat, is it? A. Yes, sir.

Q. Are you acquainted with William McKenzie?

A. Yes, I am slightly acquainted with him. [64]

Q. Did you know him on or about August 21, 1948?

A. Yes. I remember picking him up on that day.

Q. Were you the skipper or captain of the "Scoter" on that day? A. Yes, sir.

Q. Where did you see William McKenzie on that day?

A. I picked him up at Red Fish Bay.

Q. Is that on Baranof Island?

A. The southwestern coast of Baranof Island.

Q. Did he come aboard the boat?

A. We picked up his camping equipment and brought him back to Sitka.

Q. And what time did he get aboard the

(Testimony of Milton Frank Harndin.)

“Scoter”? Would you recall the approximate time?

A. I got into the harbor about 4:55, and we had all his equipment and McKenzie on board and we pulled out at 5:50.

Q. Did you engage in a conversation with him after he got aboard the boat?

A. I engaged in a slight conversation with him, but to no great extent.

Q. Now, did he show you any money when he came aboard the boat?

A. Yes. He showed me two one-hundred-dollar bills.

Q. Did he tell you where he got them?

Mr. Stabler: We object to what he told him. It is [65] not proper direct examination.

The Court: You can answer the question yes or no.

A. What is the question?

Q. Did he tell you where he got the money, the two one-hundred-dollar bills? A. Yes.

Q. Did you take the money from him, the two one-hundred-dollar bills?

A. I did not; no.

Q. But you saw them?

A. I saw them.

Q. Did you tell him what to do with the money?

A. Yes.

Mr. Stabler: We object to that as not proper direct examination, and it has no bearing on this case.

(Testimony of Milton Frank Harndin.)

The Court: Objection overruled.

Q. What did you tell Mr. McKenzie to do with the money? A. Well, I——

The Court: You don't have to repeat your exact words. Say what you told him to do.

A. I told him to turn the money over to the warden, Gomer Hillsinger, when I put him ashore at Sitka. That is where Mr. Hillsinger is.

Q. Mr. Hillsinger is Patrol Agent or an officer of the Fish and Wildlife Service? [66]

A. Yes.

Mr. Baskin: I believe that is all. You may cross-examine.

Mr. Stabler: No cross-examination.

The Court: Why did you pick him upon that day?

A. Pardon me?

The Court: Why did you pick him up on that day, on August 21st?

A. We were picking him up from that watching job down there.

The Court: I know you were bringing him back, but did the season end?

A. His job as watchman down there ended at that time.

(Witness excused.)

GOMER S. HILLSINGER

called as a witness on behalf of the Government,
being first duly sworn, testified as follows on:

Direct Examination

By Mr. Baskin:

Q. What is your full name, Mr. Hillsinger?

A. Gomer S. Hillsinger.

Q. Who are you employed by?

A. Fish and Wildlife Service.

Q. Is that of the Department of the Interior,
United States Government? A. Yes, it is.

Q. Where are you stationed; what is your station?
A. Sitka, Alaska.

Q. Where were you stationed on or about
August 22, 1948?

A. I was in Sitka, Alaska.

Q. Are you acquainted with William McKenzie?

A. Yes, I am.

Q. Did you know him on August 22, 1948?

A. Yes, I did.

Q. Did you—was he an employee of the Fish
and Wildlife Service at that time?

A. Yes, he was.

Q. Where were you when you saw him on August 22, 1948?

A. I first saw him on the street in Sitka.

Q. Did he have a conversation with you or did
you have a conversation with him?

A. Yes, I did.

Q. What did you do after you saw him on the
street?

(Testimony of Gomer S. Hillsinger.)

A. We went up to my office in Sitka.

Q. Is that the Fish and Wildlife Service Office? A. Yes.

Q. In Sitka, Alaska? A. Yes.

Q. Did you again talk with him or engage in conversation with him? A. Yes, I did. [68]

Q. Did he show you any money at that time?

A. Yes, he did.

Q. What did he show you?

A. Two one-hundred-dollar bills.

Q. Did he tell you where he got them?

Mr. Stabler: We object to that, if the Court please, as not proper testimony.

The Court: He can answer yes or no.

Q. Did he tell you where he got the two one-hundred-dollar bills? A. Yes, he did.

Q. I show you—this is Plaintiff's Exhibit No. 1, two one-hundred-dollar bills; one is known as Federal Reserve Note No. L 06995997 A, and the other is Federal Reserve Note No. L 07021621 A; and I ask you if those are the bills that he gave you?

A. I would say they were; yes.

Q. Did he give you two bills? Were they one-hundred-dollar notes that he gave you?

A. Yes, they were.

Q. And these are the same bills or similar bills that he gave you; is that correct?

A. They are similar bills; yes.

Mr. Baskin: That is all. You may examine the witness. [69]

(Testimony of Gomer S. Hillsinger.)

Cross-Examination

By Mr. Stabler:

Q. What did you do then after this was reported to you?

Mr. Baskin: Your Honor, I object as to what he did after the matter was reported to him. That is not material in this case.

The Court: I think there is nothing immaterial in this particular question. Objection is overruled.

Q. What did you do after this was reported to you?

A. I took the two bills. They were turned over to me, and then I next day, I believe it was, or the following day that I went down to the Commissioner's and filed a complaint.

Mr. Baskin: Your Honor, I don't see this that he is going into has anything to do with the case.

The Court: He has answered the question. There is nothing further before the Court.

Q. What complaint did you file?

Mr. Bailey: We object.

Mr. Baskin: We object to any further questions along that line.

The Court: Objection is sustained. It is immaterial.

Mr. Stabler: We take an exception. That is all.

Mr. Baskin: The Government rests, your Honor. That is all.

(Witness excused.) [70]

Whereupon, Court recessed for ten minutes, re-

convening as per recess with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:

Mr. Stabler: At this time we would like to make a motion, if the Court please, and I suppose in the absence of the jury.

The Court: The jury may retire to the jury room until called.

(Whereupon, the jury retired from the courtroom.)

Mr. Stabler: At this time, if the Court please, the defendant moves now for—makes this motion for acquittal on the ground and for the reason that the prosecution has failed to show that Mr. McKenzie was a person acting on behalf of the United States in any official function. Now, the testimony here alleges that Mr. McKenzie was—the last statement that was made by Mr. Hillsinger that he was an employee of the Fish and Wildlife Service at that time; and now, I think that was the statement also of Mr. McKenzie who said that he performed the duties that had been performed theretofore by a stream watchman and that he was now designated, I think, as Agent of the Fish and Wildlife.

Now, this indictment here, apparently drawn in accordance with the provisions of Section 91 of Title 18, alleges that—I refer now only to the description of the official [71] capacity of Mr. McKenzie—“said William McKenzie being a person acting for and on behalf of the United States in an official function, under and by authority of the Fish

and Wildlife Service, United States Department of the Interior, whose duties were to observe the area of Red Fish Bay, Baranof Island, Alaska," and then it goes on and says some other matters about that area being closed to fishing, "to report and disclose to officials of said Fish and Wildlife Service, and other law enforcement officials, and to arrest and cause the arrest and prosecution of, all persons fishing illegally for salmon in said closed area; knowing said William McKenzie was a person acting for and on behalf of the United States in an official function with duties as aforesaid." Now, those words describe the official capacity of the only witness here as to his official duties there.

Now, under this statute here it provides for the prosecution and punishment of anyone who "shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States"—that is the first—"or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to [72] any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses," etc.

Now, I contend here that Mr. McKenzie is not such an officer or has no official functions to perform as an officer—he had none.

Now, it so happens that Congress on June 25, 1948, repealed that Section 91, and the new act is found in 18 USCA, Section 201, and in this Section 201 the amending statute attempts to cure that very thing because it is broader in its language as to who may be bribed. I don't know whether the Court has looked at this statute or not.

The Court: Well, I have looked at it, but I don't recall any language or any difference of that kind.

Mr. Stabler: Yes, there is quite a difference, because it says first: "to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision."

The Court: You mean it added the word "person"?

Mr. Stabler: "Employee or person." The testimony of Mr. Hillsinger was that Mr. McKenzie was an employee. His own [73] testimony was that he was appointed by Dan Ralston, I think, who was Chief Enforcement Agent or Officer, and that he got some swearing-in before Miss O'Neill down here in the Bureau of Fisheries.

Now, the Committee of Congress that made those changes shows here in 18 U. S. Code under that section as to why these changes were made, and the very reason was that it did not include this old

section. Incidentally, this old section was in effect until September 1, 1948. In other words, had this alleged crime been committed just twenty days later, so to speak, it would not have come under this old section; it would have come under the new section effective September 1, 1948. The date of the alleged offense is August 12, 1948, just a few days before the new act was in effect. Now, in these notes here, the Reviser's Notes it is called, found at Page 2459 of this new Code of the Criminal Laws of the United States, Title 18, the "Section was expanded to embrace all officers or persons acting on behalf of any independent agencies or Government-owned or controlled corporations by inserting words 'or any department or agency thereof,' and by substituting words 'such department or agency' for 'department or office of the Government thereof.'

"The Supreme Court of the United States in construing section 93 of title 18, U.S.C., 1940 ed., section 434 of this title, in *United States v. Strang*, held that persons employed [74] by a Government-owned or controlled corporation, such as the old United States Shipping Board Emergency Fleet Corporation, were not within its reach or scope, because, strictly speaking, a Government-owned or controlled corporation is not an integral part of the United States Government but is to be regarded 'as a separate entity.' However, the Court implied strongly that said section 93 could be applicable to persons employed by such corporations if Congress so intended.

“When Congress enacted this section as a part of the 1909 Criminal Code, the present ramifications of the executive branch were not foreseen, and, consequently, the language proved inadequate to cover every new agency as indicated by the holding in the Strang case. Since then the growth of agencies, independent establishments, and Government-owned or controlled corporations has been phenomenal. It is the purpose of the inserted language to further what appeared unquestionably to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function.”

Then they made other changes there, and principally to cover sections which had not been covered, and other things of that kind. Now, that grew about in a case where—I think the Strang case—where it appeared that during the time the Government had the railroads in operation during the War——

The Court: Now, there is no comparison here between the railroads and corporations and the Department of the [75] Interior.

Mr. Stabler: I am saying that this is not an official function.

The Court: Have you any case on that?

Mr. Stabler: I started to say the Strang case held—during that time someone gave money to a porter to release some baggage——

The Court: You have to have another than that.

Mr. Stabler: That the porter was not holding an official function.

The Court: That was railroads under the control of the Government. That is altogether different.

Mr. Stabler: It goes on to hold that the question under the old statute, now repealed, is just how far that official function goes. In other words, is everyone under the employ of the Bureau of Fisheries performing an official function so to be subject to bribery. I say in this case Mr. McKenzie is not such an officer. If there is an official function to be performed, there is of necessity an official capacity. Now, we have here Section 227 of Title 48. It is found in the pocket parts here, and it says, "For the purposes of Sections 221-228, and 232-234"; this is, "Employees of Fish and Wildlife Service as peace officers. For the purposes of sections 221-228, and 232-234, of this title all employees of the Fish and Wildlife Service, designated by the Director, shall be [76] considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of the provisions of said sections as have United States marshals or their deputies."

Now, I asked this witness, Mr. McKenzie, if he was designated by the Director of the Bureau of Fisheries as an officer of the Bureau of Fisheries, because definitely under that statute he does not have such powers as——

The Court: Does he have to have?

Mr. Stabler: Yes, he does.

The Court: I want to see some authority for that

then. I don't think it is only peace officers that come under that.

Mr. Stabler: It designates his power. I say he would not have the power of arrest.

The Court: I don't see why he would have to have.

Mr. Stabler: I think he was not performing any official function out there. I think he was just an employee.

The Court: I get your point, but I refer to the fact you don't seem to have any authorities in support of it.

Mr. Stabler: There are plenty authorities as to when one is an employee and when one is performing an official function.

The Court: I mean under this precise statute and this precise point. [77]

Mr. Stabler: Only the porter case—he was not performing an official function; he was merely an employee.

The Court: It is not at all the same relationship.

Mr. Stabler: Well, I make my point here that Mr. McKenzie testified that he was not appointed or designated by the Director of the Bureau—the Fish and Wildlife Service—as a peace officer. He was out there merely as an employee and had no official capacity and was not performing any official function under this statute. He might be under the statute as amended, but not under that statute, and for that reason we ask that the Court direct an order of acquittal.

The Court: The motion is denied. Call the jury.

Mr. Stabler: We take an exception.

(Whereupon, the jury returned and all took their places in the jury box.)

Defendant's Case

HUGH HARRIS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination

By Mr. Stabler:

Q. What is your name? A. Hugh Harris.

Q. Where do you live, Mr. Harris?

A. Petersburg. [78]

Q. How long have you lived down there?

A. Oh, some twenty-four years.

Q. Do you know Kurt Nordgren?

A. Yes, sir.

Q. What is your occupation?

A. Fisherman.

Q. Were you on the boat last year—"Lois W"?

A. I was.

Q. Who owns that boat?

A. Mr. Nordgren.

Q. You mean Kurt Nordgren, sitting here?

A. Kurt Nordgren.

Q. Who was on the boat with you and Kurt Nordgren? A. My brother Richard.

Q. Now, calling your attention to the month of August, 1948, did you fish with those two men during that month on the "Lois W"? A. Yes.

(Testimony of Hugh Harris.)

Q. Do you remember when you started out from Petersburg, the date?

A. I don't remember the exact date we left there; no.

Q. Well, I will call your attention to the opening date—I think it was August 9th?

A. That is right.

Q. Where did you start out from? [79]

A. We started out from Petersburg.

Q. Where did you go?

A. We went up to Red Fish Bay.

Q. Did you see William McKenzie up there?

A. Yes.

Q. What did you do up there that day?

A. Oh, we just monkeyed around up there.

Mr. Baskin: Your Honor, I think the witness should be asked what day. I think it is too general.

The Court: I thought he was referring to a certain day. A. August 9th.

Mr. Stabler: August 9th, the opening day.

The Court: Continue.

Q. What did you do up there in Red Fish Bay?

A. We got our seine straightened out there and, if I recall, we made two sets outside the line there.

Q. What do you mean "outside the line"?

A. Legal water, legal territory.

Q. Now, here is a map of Baranof Island. This is map—Chart No. 28253. I will ask you to step over here and show where you mean that you took them in the legal water.

(Testimony of Hugh Harris.)

A. This water here is closed; outside here is open.

Q. Do you see a red line there on that chart? Are the waters north of that line closed—were they at that time? [80]

A. This is north?

Q. Yes.

A. All this water in here is closed.

Q. How about south of that line?

A. No; that is open.

Q. Now, take your chair. Did you do any fishing in that closed area that day?

A. No, we didn't.

Q. Or any other day?

A. Not last year.

Q. Did you see William McKenzie there?

A. Yes, I seen William McKenzie there.

Q. Did any conversation happen or anything of that kind? A. Well, not with me.

Q. Did he come on your boat?

A. On the 9th?

Q. Yes. A. No, I don't believe he did.

Q. What did you do on the next day, the 10th?

A. Next day we was on our way to town.

Q. What town? A. Petersburg.

Q. Did you have any fish?

A. We had some, yes.

Q. Where did you catch those? [81]

A. We caught some of those fish at Red Fish Bay.

(Testimony of Hugh Harris.)

Q. North or south of the line?

A. Legal water, south of the line.

Q. How long were you in Petersburg on that trip before you came back?

A. Let's see. We got in there late in the evening.

Q. You are talking about the 10th?

A. Yes; the evening of the 10th; and sold our fish that night.

Q. Who did you sell them to?

A. Kaylor & Dahl Fish Company.

Q. How many fish did you have?

A. I don't recall exactly; around 1200, I think, something like that.

Q. What kind of fish?

A. I think they were all reds. I am not certain whether there were any humpies in there or not.

Q. Do you remember how much you got for those fish? A. Not the exact dollar; no.

Q. Can you give us an idea?

A. 1200; it must have been something over \$1600.00.

Q. Now, were any of those fish caught in that closed area of Red Fish Bay? A. No.

Q. Did you or any member of your crew to your knowledge have any agreement with William McKenzie about fish? [82]

A. Not to my knowledge; no.

Q. You sold those fish in Petersburg, you say?

A. Yes, that is right.

(Testimony of Hugh Harris.)

Q. When next were you in the vicinity of Red Fish Bay?

A. Oh, let's see. I think we got back there on the 13th.

Q. Where were you on the 12th?

A. Let's see. We were en route from Petersburg to Red Fish. We stopped in Red Bluff Bay and was there early in the morning. From there we went to Pillar Bay.

Q. I am going to ask you if you were in Red Fish Bay—I am not talking about Red Bluff Bay, but Red Fish Bay—on the 12th of August?

A. No. We couldn't very well have been there on the 12th of August.

Q. Where did you go from Red Bluff Bay?

A. To Pillar Bay.

Q. Did anything happen there?

A. Nothing out of the ordinary. We saw a Bureau plane. They talked to us.

Q. Fish and Wildlife? A. Yes.

Q. That was in Pillar Bay? A. Yes.

Q. That was the 13th?

A. I am quite sure it was the 13th. [83]

Q. Now, where did you go from Pillar Bay?

Mr. Baskin: Your Honor, I don't see where activities in other bays is material in this case, and I object to any further examination along this line.

The Court: If the purpose is to show they were not in Red Fish Bay on the date testified by your witness, why, it would be material.

(Testimony of Hugh Harris.)

Mr. Stabler: That is what I am showing, if the Court please.

Q. On that date you were in Red Bluff Bay, and next day you went to Pillar Bay; is that correct?

A. Yes, sir. We were in Red Bluff Bay the early morning of the 13th. From there we went to Pillar Bay.

Q. All right. And at Pillar Bay you saw the Fish and Wildlife plane? A. Yes.

Q. That was the 13th. Where did you go from Pillar Bay? A. To Red Fish Bay.

Q. What time did you get to Red Fish Bay?

A. Sometime that afternoon, the 13th. I don't remember exactly what time it was.

Q. Where did you stay that night?

A. Let's see.

Q. The night of the 13th?

A. We anchored at ten fathom anchorage that night. [84]

Q. Where is ten fathom anchorage?

A. That is at the mouth of Red Fish.

Q. I will ask you to step over here and show the jury where it is.

A. It is marked on the chart ten fathom anchorage. Excuse me; that is the wrong spot. Here.

Q. That is in Red Fish Bay?

A. Yes. This is all Red Fish Bay in here, the whole thing.

Q. But it is south of this red line?

A. Yes.

(Testimony of Hugh Harris.)

Q. And that is where you anchored that night; is that right? A. Yes.

Q. Had you done any fishing before you got there? A. On that trip?

Q. Yes.

A. No, we hadn't done any fishing on that trip.

Q. Did you go anywhere north of this red line?

A. On that day?

Q. Yes.

A. We were inside the Bay that day.

Q. What were you up there for?

A. Looking around, seeing if there were any fish.

Q. Why did you go up there looking for fish?

A. We were not necessarily looking for fish. If there are fish in the Bay, usually there are some on the narrows on [85] the outgoing tide.

Q. Did you see William McKenzie that day?

A. Yes.

Q. What, if anything, happened?

A. There wasn't much of anything happened. He was aboard the boat.

Q. What did he do on the boat?

A. Talking. I believe he ate with us that day.

Q. That is the 13th now that you are talking about? A. Yes.

Q. Did he have anything to drink on your boat?

A. We had a——

Q. I mean did Mr. McKenzie have anything to drink on your boat?

(Testimony of Hugh Harris.)

A. He had some beer, and I think one drink of whiskey, maybe two.

Q. How did you get along with Mr. McKenzie? Did he show signs of being fearful of any of you men?

A. No; not fearful.

Q. How did he act?

A. He acted friendly like anybody else, glad to see a fisherman or anybody else come into the Bay to talk to.

Q. He came on your boat?

A. Yes.

Q. Drank your whiskey? [86]

A. Yes.

Q. Beer?

A. Yes.

Q. Did he have anything to eat?

A. My duties are cook on the boat. I asked him to have dinner with us.

Q. Did he have dinner with you?

A. Yes.

Q. Was anything said about how he was fixed for grub at that time?

A. We asked him if he was short of anything and what he had had to eat. We——

Mr. Baskin: We object, your Honor. What he is saying is hearsay.

Mr. Stabler: I don't think what Mr. McKenzie said was hearsay, if the Court please.

The Court: It is an immaterial matter. In a sense, there hardly need be an objection to it. It has already been testified to. But in addition to that it seems to me that it is immaterial. He admits he got grub there, so what is the use of going into it?

(Testimony of Hugh Harris.)

Mr. Stabler: He said he was afraid these men would put a rock around his neck and throw him overboard.

The Court: But he said he was afraid only until after he accepted their proposition. [87]

Mr. Stabler: Oh, I see.

Q. Now, did you make any sets up here north of this line?

A. No. We didn't fish inside the Bay.

Q. Did you make any set there on the 9th of August? A. Inside the Bay?

Q. North of this red line? A. No.

Q. The 12th of August?

A. No. We didn't fish in there.

Q. Or the 15th or 16th? A. No.

Q. When were you in that place next; do you recall?

A. Well, we left there and went up the shore. We fished all day Saturday.

Q. That is the 14th? A. Yes.

Q. Where did you fish on the 14th?

A. Whale Bay.

Q. Where is that?

A. That is a little further on up. The chart doesn't show it.

Q. In here?

A. That is a large scale chart; I think, way on up past what the chart shows.

Q. I don't know whether you said when you were next into Red Fish Bay and saw Mr. McKenzie? [88]

(Testimony of Hugh Harris.)

A. I think we came back in there Sunday.

Q. That was closed on Sunday?

A. Oh, yes. It is closed all over on Sunday.

Q. What did you go in there for?

A. To anchor.

Q. And where did you anchor?

A. I don't know whether we anchored up in the bay that night or out in the ten fathom.

Q. Did you see Mr. McKenzie that day?

A. Yes; we seen him that day.

Q. What happened?

A. Oh, he was out aboard the boat again, and we gave him a fish to eat.

Q. And anything else?

A. Nothing else except he had a couple drinks of whiskey and went back ashore.

Q. Did he have any beer?

A. He had beer too.

Q. Did you give him any groceries or did he have dinner with you?

A. He only had dinner aboard the boat once, one time.

Q. Was that the time you gave him provisions?

A. When he had dinner.

Q. The 15th, or the other time?

A. I think the day he ate with us was the time we gave him [89] some things to take ashore with him.

Q. You were a member of that crew and entitled to a share of the receipts?

(Testimony of Hugh Harris.)

A. Yes; that is right.

Q. Was any agreement made to your knowledge with Mr. McKenzie to have a share of your fish?

A. No.

Q. Was any deductions made from the sale of fish for any share for Mr. McKenzie?

A. No.

Q. Do you know anything about two one-hundred-dollar bills being paid to Mr. McKenzie for a share of fish caught by you or your crew on the "Lois W"?

A. No. I don't know anything about it.

Q. Did you ever have any trouble with Mr. McKenzie of any kind?

A. No. I never had no trouble with him.

Q. Were you friendly?

A. I always was friendly to him.

Mr. Stabler: You may cross-examine.

Cross-Examination

By Mr. Baskin:

Q. Are you Richard or Hugh Harris?

A. I am Hugh. [90]

Q. You have a brother by the name of Richard; is that right?

A. That is right.

Q. And he was also one of the members of that crew of the "Lois W"?

A. Yes.

Q. Hugh, tell me, are you related to Mr. Nordgren here, the defendant?

A. Yes.

Q. What is your relation to him?

A. Brother-in-law.

(Testimony of Hugh Harris.)

Q. You are married to his sister?

A. We are married to sisters.

Q. Both of you married sisters?

A. Yes.

Q. I believe you testified that you were in Red Fish Bay on August the 9th; is that right?

A. Yes, sir; that is right.

Q. What time did the season open?

A. The season opened at six o'clock in the morning, August 9th.

Q. And you were already at Red Fish Bay at the time?

A. We left town on Sunday and got there on the 9th.

Q. Were you up inside the area, closed to fishing, on the 9th? A. Yes.

Q. And saw Mr. McKenzie up there?

A. I saw him on the beach. [91]

Q. But you didn't personally talk with him at the time? A. No.

Q. You only talked with him while he was on the boat?

A. I only talked with him while he was on the boat; that is right.

Q. Now, were you up there on August 12, 1948?

A. No; we wasn't in there August the 12th.

Q. Where were you on August 12th?

A. We was on our way out from town.

Q. From Petersburg? A. Yes.

Q. You didn't arrive at Red Fish Bay on that date? A. No.

(Testimony of Hugh Harris.)

Q. Are you certain of that?

A. Quite certain.

Q. How do you know you weren't there on the 12th?

A. It is a 16-18 hour run out there, and we stopped at two different bays on the way. That would take quite a while longer. We couldn't very well have made it by the afternoon.

Q. You couldn't be mistaken about not being in the Bay that day? A. No.

Q. But you could have been up there?

A. In Red Fish? [92]

Q. It is possible you could have been in Red Fish Bay on August 12th?

A. We were in Petersburg.

Q. It is impossible for you to be mistaken, and you couldn't have been in Red Fish Bay on August 12th? Is that what you want the jury to believe? It is impossible; you couldn't have been there?

A. I am saying we left town.

Q. I am asking the question—is it possible you were in Red Fish Bay on August 12th?

A. I don't see how it is possible.

Q. Is it impossible for you to have been in Red Fish Bay on August 12th?

A. As long as we were on the boat——

Q. You couldn't possibly have been in Red Fish Bay on August 12th? That is what you want them to think?

A. I don't see how we could be.

(Testimony of Hugh Harris.)

Q. As a matter of fact, you were there.

A. I wasn't there.

Q. And it wasn't possible for you to have been there?

A. I don't see how it could be.

Q. That is what you want the jury to believe; is that right?

A. Yes.

Q. When did you see Mr. McKenzie next?

A. I seen him the afternoon or evening of the 13th. [93]

Q. First—on August 9th what time did you get into Red Fish Bay?

A. We got there that morning.

Q. Early in the morning?

A. No; not early.

Q. What time?

A. I don't remember exactly; sometime around—I would say in the middle of the forenoon.

Q. Before noon. How long were you there?

A. Till that evening.

Q. What time in the evening?

A. Oh, let's see. I think we left there about—let me think—no; it was around—let's see. We fished outside there. I think we left there sometime between ten o'clock that evening and midnight.

Q. You arrived before noon, you said, and that was up inside the closed area of Red Fish Bay?

A. Yes.

Q. And you stayed up there until about ten or eleven o'clock that night?

(Testimony of Hugh Harris.)

A. No. I didn't say that.

Q. What did you say?

A. I said we left the Bay.

Q. What time did you leave the Bay?

A. The Bay includes all that water. We fished outside. [94]

Q. You went up in the closed area in the forenoon? A. Yes.

Q. How long did you stay up there in the closed area north of the red line?

A. Not very long.

Q. How long would you say?

A. A matter of maybe a half an hour.

Q. What did you do then? You left about ten or eleven o'clock and went to the outside?

A. Eleven o'clock when?

Q. A.M. on August 9th.

A. Yes. We fished out there all day.

Q. Your testimony is you spent about thirty minutes inside the closed waters; is that right?

A. That is right as near as I can remember.

Q. What did you go up in that part of the Bay for? A. To look around.

Q. What for? A. Fish.

Q. What kind of fish?

A. The only kind of fish that run there are red salmon.

Q. You knew that area was closed, didn't you?

A. Yes.

Q. What did you go up and see if there were any fish up there for? [95]

(Testimony of Hugh Harris.)

A. I explained to Mr. Stabler, if fish are inside the Bay, usually fish come through the narrows on the outgoing tide.

Q. What is the approximate distance separating the closed area from the open Bay—from the stream that runs into the mouth of Red Fish Bay; what is that approximate distance?

A. You mean——

Q. What is the distance from the line which crosses the second narrows, which separates the closed area from the open area, and the head of the Bay up there where you went in and anchored, August 9, 1948?

A. About a mile and a quarter to the head of the Bay.

Q. And you went all the way up in this closed area to see if any salmon were up there?

A. We went all over up there.

Q. And all over this area you were looking for salmon? A. Yes.

Q. When they start upstream do they usually hang around the mouth of the stream?

A. Red salmon, when they start, usually go right up.

Q. Were there a lot of fish in there?

A. I wouldn't say a lot, but there was fish there.

Q. And you saw them?

A. I saw them jumping; yes.

Q. And that is the time you saw Mr. McKenzie on the beach?

(Testimony of Hugh Harris.)

A. I saw Mr. McKenzie on the beach that day.

Q. You don't deny that?

A. No; I don't deny that.

Q. When did you next see him?

A. Let's see. The next time I seen him was when he come aboard the boat and had dinner with us.

Q. Were you inside the closed area?

A. Yes; anchored.

Q. What day was that? A. The 13th.

Q. How do you know?

A. By the calendar.

Q. Did you pull a calendar out and look at it?

A. No. We just left town on the 12th and come right out there, so it couldn't very well have been anything but the 13th.

Q. And you saw Mr. McKenzie, and he was aboard the boat?

A. He was aboard the boat.

Q. What time of day did you go into Red Fish Bay on the 13th? A. On the 13th?

Q. Yes; in the closed area for salmon fishing.

A. In the evening.

Q. What time?

A. I don't remember exactly what time; it was before dark.

Q. How long would you say before dark? Don't you want to answer that question? [97]

A. I have no objection to answering the question.

(Testimony of Hugh Harris.)

Q. Then state how long before dark it was before you went into the Bay.

A. I believe it was around four or five o'clock in the evening when we got in there.

Q. Four or five o'clock in the evening?

A. The 13th.

Q. How long did you stay up there?

A. We stayed for a while; while he was on the boat. He had dinner.

Q. Do you remember how long you were in the closed area? A. Not exactly; no.

Q. You don't want to remember, do you?

A. Well, I don't know exactly what you mean by that—I "don't want to remember."

Q. Answer the question. You don't want to remember how long you were out in Red Fish Bay in the closed area?

A. I don't remember exactly.

Q. Answer my question. You don't want to say how long you were up there?

A. That is a statement.

Q. If you don't want to answer. You were there on the 13th. Were you in Red Fish Bay on the 14th? A. No.

Q. Do you know what day August 14th was?

A. Saturday.

Q. Then you could have been fishing on August 13th at the time you were up there in the Bay, couldn't you?

A. Not very well, not with a watchman aboard.

Q. You said you went in there early in the evening of August 13th; is that right?

(Testimony of Hugh Harris.)

A. That is what I said.

Q. And then you could have been fishing in open water during the time that you were up in closed water, couldn't you?

A. If the tide had been right.

Q. Was the tide right?

A. No, it wasn't.

Q. Do you remember?

A. We would have been out fishing.

Q. You don't know what the tide was?

A. I don't remember whether it was incoming or outgoing.

Q. Answer the question. You could have been fishing about four or five o'clock on August 13th if you knew where to fish?

A. If there was fish.

Q. You could have been fishing at those hours?

A. Yes.

Q. Instead you were up here, in a closed area, anchored; is that right?

A. Yes. [99]

Q. And that was on a Friday. Now, where were you on August 14th?

A. Whale Bay.

Q. Whale Bay? A. Yes.

Q. Did you go to Whale Bay—you went to Whale Bay from Red Fish Bay?

A. Yes.

Q. And what time did you get to Whale Bay?

A. We got there real early Saturday morning and fished there all day.

Q. You fished in Whale Bay all day?

A. Yes.

(Testimony of Hugh Harris.)

Q. Did you fish in Red Fish Bay on August 14th?

A. No, we didn't fish in Red Fish. We fished in Whale Bay on the 14th.

Q. When did you next go to Red Fish Bay?

A. We came back there again on Sunday.

Q. That was on August the 15th?

A. Yes.

Q. What time of the day was that?

A. I don't remember what time of the day it was exactly.

Q. Well, you know about whether it was in the afternoon or morning, don't you?

A. No. We left—we came down there that morning—let's see— [100] ordinarily it is around a three-hour run between Red Fish and Whale Bay.

Q. What time were you in Red Fish Bay on August 15th? A. What time?

Q. What time did you get up into Red Fish Bay?

A. Well, I don't remember exactly what time it was. We was monkeying around there.

Q. How long were you up there in Red Fish Bay? A. We anchored that night.

Q. Did you go in Red Fish Bay on the morning of August 15th? A. Sunday?

Q. Yes. A. Yes.

Q. And you didn't anchor until that night?

A. We anchored at ten fathom anchorage.

Q. What time did you anchor at ten fathom anchorage?

(Testimony of Hugh Harris.)

A. I don't recall the exact time.

Q. Then you admit you were in the closed area up there on the morning of August 15th?

A. Up there?

Q. In that area?

A. All around there.

Q. Did you sail around in that closed area?

A. We were not sailing.

Q. Were you in that closed area? [101]

A. We drifted around in there.

Q. What were you doing up there drifting around in that closed area? Looking for fish?

A. I wouldn't know whether we were looking for fish or not. We had dinner and took a nap. We were waiting for weather to go on to town.

Q. And looking for any fish that was up in that closed area, were you not? A. No.

Q. Do you mean to tell the jury you were a fisherman and in a closed area and not looking for fish?

A. Not on Sunday, we don't usually look for fish.

Q. You didn't see any?

A. They were jumping.

Q. You looked then?

A. You can see them without necessarily looking for them.

Q. You told the jury you caught some fish on August 10th; didn't you say you caught those fish, some red fish, just south of the red line that separates the closed area from the open area?

A. Did I say the 10th?

(Testimony of Hugh Harris.)

Q. That is what I understood.

A. I thought I said the 9th, the day the season opened.

Q. Did you fish then on August 10th?

A. Yes. [102]

Q. That was——

A. Way south of the line; coming up Sumner Straits.

Q. Did you say about 1200? A. Yes.

Q. Sockeye, red fish? A. Yes.

Q. That is actually what you caught, about 1200 fish? A. That is what I said.

Q. And you sold those to Kaylor & Dahl Company in Petersburg? A. Yes.

Q. Didn't you say that you were back fishing up here on Baranof Island after August the 10th?

A. Yes. On the 14th.

Q. When did you leave Baranof Island to go to Petersburg? A. Baranof Island?

Q. Yes.

A. I think we left there on Sunday—early Monday morning, real early—for town.

Q. All right. Now, tell the jury why you went from Baranof Island all the way to Petersburg to sell the fish?

A. To get the price for them.

Q. You mean they pay a different price at Petersburg than up on the Island?

A. We couldn't go to Sitka on account of the weather.

(Testimony of Hugh Harris.)

Q. You know where Port Alexander is? [103]

A. They don't buy fish there.

Q. How do you know?

A. They don't sell red salmon.

Q. Did you go there on or before August 10th and try to sell any?

A. No; because they weren't buying.

Q. You didn't go there to sell salmon before this, did you?

A. Most every fisherman knows where he can sell his fish.

Q. Do you mean to tell the jury the fish buyer at Port Alexander at the south end of Baranof Island doesn't buy fish?

A. He is in the business of troll-caught salmon and halibut.

Q. Are you sure of that? A. Yes.

Q. You didn't know it August 10th?

A. Yes, I knew. Besides, I wasn't running the boat.

Q. Is that the reason you went with the boat to Petersburg? A. It could be.

Q. That was the reason you went to Petersburg, wasn't it; and then after August 10th you came all the way back up to Baranof Island to fish again?

A. Yes.

Q. And on the 13th, I believe, you went into Red Fish Bay; isn't that what you said a while ago?

A. That is what I said.

(Testimony of Hugh Harris.)

Q. You saw Mr. McKenzie at that time? [104]

A. Yes.

Q. When was the next time you were in Red Fish Bay?

A. Didn't I say we come down on Sunday?

Q. I am asking you. I have really forgotten. When was it? Was that the 15th?

A. It was Sunday.

Q. Did you see Mr. McKenzie at that time?

A. Yes, I seen him all right.

Q. He was aboard your boat at that time?

A. I don't think he was on Sunday. Yes, he was. He come out in the skiff.

Q. Where was he when you saw him? Was he on the beach or where was he when you saw him?

A. I seen him on the beach all right.

Q. That was on the 15th. You said your name is Hugh Harris? A. Yes.

Q. Now, Hugh, state whether or not you were convicted for illegal fishing in the United States Commissioner's Court at Sitka, Alaska, on or about the 26th day of August, 1947?

Mr. Stabler: We object to that, if the Court please, for the reason that he is attempting to impeach. He can ask if he was convicted of a crime, but not a specific crime.

The Court: Objection overruled.

A. I plead guilty to a charge of illegal fishing in Sitka.

Q. In the United States Commissioner's Court.

(Testimony of Hugh Harris.)

at Sitka on [105] August 26, 1947? A. Yes.

Q. Then you were convicted then upon your plea of guilty?

A. Yes. I paid a fine.

Q. And you are the brother-in-law of Kurt Nordgren? A. Yes.

Q. And the brother of Richard Harris?

A. Yes.

Mr. Baskin: That is all.

Redirect Examination

By Mr. Stabler:

Q. Just one question. Did the fact that you ran to Petersburg—because you lived in Petersburg, did that have anything to do with your running to Petersburg with your fish?

A. The main reason we went to Petersburg was that the price amounted to almost four or five hundred dollars difference on the fish that we had, the difference between the fish prices, and we took them into the cannery in Petersburg.

Q. Now, you were also charged with a violation of fisheries laws in this case too, weren't you?

Mr. Baskin: We object to that.

The Court: I thought I ruled on that.

Mr. Baskin: The Court has ruled on it.

The Court: Objection sustained. [106]

Mr. Stabler: That is all.

Recross-Examination

By Mr. Baskin:

Q. I would like to ask another question. You

(Testimony of Hugh Harris.)

said that they pay four hundred and fifty or five hundred dollars difference in Petersburg for fish than they do up near Sitka?

A. Almost; three hundred anyhow.

Q. You sold 1200 fish, approximately 1200 fish?

A. Yes.

Q. And you said you got about \$1600.00 for them?

A. Something over sixteen hundred.

Q. And then at Sitka or Port Alexander or any of the places near the south end of Baranof Island, they would only pay about a thousand dollars for the fish you had?

A. A little more; Sitka would probably pay a little more, but it was a tough run for us around there with the boat.

Q. Are you telling the jury that at Sitka they would pay about a thousand dollars, and more at Petersburg?

A. I will retract the statement and say four hundred, awful close to that, on that much fish.

Q. Why was it more at Petersburg than at Sitka?

A. Maybe they were more anxious to get the fish. It has always been that way.

Q. On or about August 10, 1948, did you go to Sitka to find [107] out the price of fish?

A. I explained to you before we usually know prices of fish before we go fishing.

(Testimony of Hugh Harris.)

Q. Doesn't the price of fish vary during the season by different buyers and bidders?

A. Yes, somewhat; usually though it is later on in the season.

Mr. Baskin: That is all.

Mr. Stabler: That is all.

(Witness excused.)

RICHARD HARRIS

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on:

Direct Examination

By Mr. Stabler:

Q. What is your name?

A. Richard Harris.

Q. Where do you live, Mr. Harris?

A. In Petersburg.

Q. How long have you lived in Petersburg?

A. Since about 1923.

Q. What is your occupation?

A. Fisherman.

Q. How long have you known Kurt Nordgren?

A. Oh, I know him since 1932.

Q. Were you fishing with Kurt Nordgren in the year 1948 during [108] the fishing season?

A. Yes.

Q. Do you remember when the season opened for salmon?

(Testimony of Richard Harris.)

A. I believe it opened on August the 9th.

Q. Did you go out fishing on that date?

A. Yes. We usually leave a day ahead of the season.

Q. Do you recall where you were on Monday, August 9, 1948? A. Yes.

Q. Tell the jury.

A. We was in Red Fish Bay.

Q. What boat? A. "Lois W."

Q. Who was aboard?

A. Myself, my brother Hugh, and Mr. Kurt Nordgren.

Q. What did you go in there for?

A. To see if there were any fish in there.

Q. When you say Red Fish Bay, what do you mean? This is a map of Red Fish Bay.

A. The whole bay from ten fathom anchorage and on in.

Q. You see this red line here? A. Yes.

Q. Did you go up past that red line that day?

A. Yes.

Q. What for?

A. To look and see if there were any fish up there.

Q. Why were you interested? You knew it was a closed area?

A. Yes. But not when the fish back out of there.

Q. Why did you go up there?

A. To see if there were any fish.

Q. Did you do any fishing up there that day?

(Testimony of Richard Harris.)

A. No.

Q. Do you know William McKenzie?

A. Yes.

Q. Did you see him up there that day?

A. I seen him on the beach.

Q. Tell the jury the circumstances.

A. We come in and see a tent on the beach. We figured somebody was camping there. We anchored within 100 feet of where he had his tent pitched.

Q. What happened?

A. I remember he come out on the beach. I think Kurt Nordgren went ashore and talked with him a while there.

Q. Did he come on your boat?

A. Not that day, I don't think.

Q. How long did you stay up there on the 9th, opening day?

A. Only a little while. We went out and come back in again that evening.

Q. Did you do any fishing?

A. Yes; outside the line, outside the narrows.

Q. You mean south of this red line? [110]

A. Yes.

Q. What time did you get back up there, or where did you stay that night?

A. We anchored up there that night.

Q. All night?

A. No. We left again. We went up there and we left again that same night.

Q. Did you do any fishing up there north of the red line?

(Testimony of Richard Harris.)

A. No; we never fished up there.

Q. Where did you go after you left there on that night or on Monday, the 9th?

A. We went to Petersburg.

Q. What for? A. To deliver fish.

Q. What time did you get into Petersburg?

A. Oh, I don't know, maybe between seven and eight o'clock on Tuesday; that would be the day after the season opened.

Q. How much of a run is it from Red Fish Bay to Petersburg?

A. The trip altogether—Chatham Strait, Sumner Strait, through Wrangell Narrows—takes 12-14 hours, something like that. It depends on the weather.

Q. Did you sell any fish in Petersburg that night? A. Yes.

Q. Do you remember how many?

A. No. They weigh them. They buy them by weight. I don't [111] remember what the weight was.

Q. Do you remember what they came to?

A. I believe it came to about \$1700.00.

Q. Do you know how many fish you had?

A. I wouldn't be able to say exactly how many fish we had.

Q. Who did you sell them to?

A. To Kaylor and Dahl Cannery.

Q. Did you catch any of those fish in Red Fish Bay north of that line? A. No.

(Testimony of Richard Harris.)

Q. After you sold your fish in Petersburg on Tuesday, where did you go next?

A. First we take out the fish and wash down the boat, and that was next day we took ice, and we go get gas. I think we laid there that night.

Q. In Petersburg? A. Yes.

Q. That would be Wednesday, the 11th?

A. Yes, that is right.

Q. Where did you go—what time did you leave Petersburg next? A. About noon.

Q. Of what day?

A. That would be the day—we laid in Petersburg; we sold fish the 10th, took stuff the 11th, and left about noon of the 12th. [112]

Q. And where did you go?

A. To Red Bluff Bay in Chatham Strait.

Q. Where is Red Bluff Bay with relation to Red Fish Bay? You say you went to Red Bluff Bay?

A. Red Bluff Bay. It is in Chatham Strait. It is on Baranof Island but it is on the other shore.

Q. You went from Petersburg to Red Bluff Bay? A. Yes.

Q. How long did you stay there?

A. We stayed there that night, left there early in the morning, I think, went over to Pillar Bay then—across the strait on the other side again.

Q. I am asking, were you in Red Fish Bay north of this line at any time on the 12th of August? A. No.

Q. That would be Thursday. Did you see William McKenzie that day, the 12th of August?

(Testimony of Richard Harris.)

A. No. We anchored in ten fathom anchorage when we did come down there, at first anyhow.

Q. I think you said you saw him on the 9th?

A. Yes, the 9th.

Q. Do you remember the next time you saw him?

A. It would be some time in the afternoon of the 13th.

Q. All right. You left, according to your testimony you left Red Bluff Bay and went to Pillar Bay and got to Pillar Bay [113] on the 13th?

A. In the morning, yes.

Q. Did anything happen in Pillar Bay? Did you notice any Fish and Wildlife plane?

A. The Fish and Wildlife plane was there.

Q. Where is Pillar Bay?

A. It is up in Chatham Strait; it is quite a ways from there; it is about thirty-five or forty miles at least.

Q. How much of a run is it with your boat from Petersburg to Red Bluff Bay?

A. With Kurt's boat?

Q. That is what I mean.

A. It is something like eleven or twelve hours.

Q. And from Red Bluff Bay to Pillar Bay?

A. Not very long; maybe two hours and a half.

Q. And from Pillar Bay to Red Fish Bay?

A. That is close to between four and five hours.

Q. So, you were in Pillar Bay then on Friday, the 13th? A. In the morning.

(Testimony of Richard Harris.)

Q. And saw the Fish and Wildlife plane there?

A. Yes.

Q. Where did you go from Pillar Bay?

A. We went down to Red Fish.

Q. What did you go down there for?

A. Outside of Baranof, that is where we had been fishing. [114]

Q. What did you go down there for?

A. To look for fish.

Q. Did you get any fish?

A. We got—we picked up fish as we go along. Sometime we make a set, and sometimes we don't.

Q. Do you remember what time you got into Red Fish Bay on the 13th, Friday?

A. It must have been in the early afternoon.

Q. Do you know where you anchored that night?

A. I believe we anchored in the ten fathom anchorage that night, either that time or the time before when we was there; I don't remember exactly.

Q. Did you see Mr. McKenzie that day, the 13th?

A. We seen him that trip out. I wouldn't say it was exactly the 13th.

Q. Do you remember what day it was when he came on your boat and had dinner?

A. It must have been that same day.

Q. The 13th? A. Yes.

Q. Tell us about how he happened to come out there.

(Testimony of Richard Harris.)

A. When we come in there, he come down to the beach. We come right up there, and he come down to the beach and hollered out to us to come and get him. He wanted to talk with us. We brought him out. He sat on deck for a while talking [115] about different things and had a couple bottles of beer with us and a drink of whiskey, and he ate supper too, I think, and we gave him some groceries too that same trip. He was pretty short on groceries.

Q. Did you have any fish on board at that time?

A. Yes, we had fish.

Q. How did you carry them?

A. We carry them in ice all the time.

Q. Where did you catch them?

A. I think we made a little haul outside of Red Bluff Bay. We made a little haul at that time.

Q. You mean——

A. Outside. I think we made a little haul at that time. We fished outside of Red Fish Bay too.

Q. What brought up this fish that he wanted or got?

A. Oh, he said he couldn't catch one out of the creek and was short on groceries, and we said——

Mr. Baskin: We object to the witness testifying what Mr. McKenzie said.

The Court: It is already in evidence that he asked for a fish. As to the reasons for it, it is immaterial. Did you give him a fish?

A. Oh, yes.

(Testimony of Richard Harris.)

Q. And where did you have that fish on the boat? A. We had it in the hold. [116]

Q. On ice? A. Sure.

Q. And you gave him some groceries?

A. Yes.

Q. Do you remember what groceries?

A. One——

Mr. Baskin: We object.

The Court: Sustained. It is immaterial what he gave him.

Q. What was your relations at that time with Mr. McKenzie? Were they friendly or were they otherwise?

A. Oh, he was all right. We treated him fine, and he seemed to treat us all right. There was no trouble.

Q. On Sunday, the 15th, where were you?

A. We was coming back from Whale Bay, coming back to town.

Q. Where is that?

A. Two and a half hours up to the west shore there.

Q. How was the weather outside on Sunday?

A. It was pretty fair weather except when we come down by Red Fish Cape. It was pretty good down that far but wasn't much good after that.

Q. Did you share in the fish that was sold during all of these trips? A. Sure I shared.

Q. Did you have any arrangement with William McKenzie to give [117] him a share of any fish that you caught? A. No.

(Testimony of Richard Harris.)

Q. Do you know anything about two one-hundred-dollar bills being given to Mr. McKenzie for fish caught on your boat or a share of fish caught by the "Lois W"?

A. I seen the two bills in Sitka that they said we gave to him.

Q. Do you know anything about that?

A. No, I never.

Q. Was any arrangement to your knowledge made by Kurt Nordgren or anybody else on the "Lois W" to share with Mr. McKenzie in any fish caught by the "Lois W" in Red Fish Bay?

A. No; nor any place else.

Mr. Stabler: You may cross-examine.

Whereupon, the jury was duly admonished and Court adjourned until 10:00 o'clock a.m., April 19, 1949, reconvening as per adjournment, with all parties present as heretofore and the jury all present in the box; whereupon, the trial proceeded as follows:

Cross-Examination

By Mr. Baskin:

Q. You are Richard Harris, are you not?

A. That is right.

Q. You live at Petersburg? [118]

A. Yes.

Q. Are you any relation to the defendant?

A. Yes. No, not to the defendant; no.

Q. You are not related to Kurt Nordgren?

A. No.

(Testimony of Richard Harris.)

Q. But you and Hugh Harris are brothers?

A. That is right.

Q. You fished with Kurt Nordgren during 1948?

A. Yes.

Q. And I believe you said that you were in Red Fish Bay on August the 9th?

A. That is right.

Q. At that time you saw Mr. McKenzie?

A. Yes.

Q. What time did you get up into the area of the Bay where you could see Mr. McKenzie on August the 9th?

A. It was in the afternoon.

Q. Well, about what time was it?

A. Oh, it was in the early afternoon; I don't know, say between one and three o'clock, something like that.

Q. Between one and three o'clock?

A. Yes.

Q. Could it have been two o'clock?

A. It might have been. It was between one and three.

Q. All right. How long did you stay there?

A. Not very long; just a little while.

Q. How long would you say?

A. Oh, maybe half an hour.

Q. What did you do then?

A. We went outside the Bay.

Q. You mean outside the closed area?

A. Clear out, outside of the closed area.

(Testimony of Richard Harris.)

Q. Did you come back into the Bay that evening, into the closed area? A. That evening?

Q. Yes.

A. No; I don't remember exactly whether we come back into the Bay that evening. I think we started for town that same evening, that same night about eight o'clock.

Q. You mean you started for town about eight o'clock. A. Yes.

Q. Then you spent from about one to three o'clock, and then until eight o'clock, up in the closed area? A. No; I didn't say that.

Q. Then where were you from three until about eight o'clock?

A. We were fishing outside the area.

Q. Outside?

A. That is where we always fished.

Q. You hasten to say that, don't you?

A. No. [120]

Q. When did you go to Petersburg.

A. That same evening about eight o'clock.

Q. Didn't you say you arrived at Petersburg on the 10th of August?

A. Yes; at Petersburg at Kaylor & Dahl's Cannery about eight o'clock in the evening.

Q. Eight o'clock in the evening?

A. About that time, close to it.

Q. How long a run is it from Red Fish Bay to Petersburg?

A. It depends on a lot of things.

(Testimony of Richard Harris.)

Q. How long did it take you then to go from Red Fish Bay to Petersburg?

A. I would say, on the average, between twelve and fifteen hours; it depends on the weather and the tide; sometimes longer.

Q. When did you return to Red Fish Bay?

A. We didn't come back; we didn't come straight back to Red Fish Bay from Petersburg.

Q. I believe you said you come back to Red Fish Bay on the 13th; is that correct? A. Yes.

Q. You are sure it was the 13th that you were in Red Fish Bay? A. Yes.

Q. You couldn't be mistaken as to the date, could you?

A. I don't hardly think so because I remember it was Friday, [121] the 13th, we were in Pillar Bay, and we went from Pillar Bay to Red Fish Bay.

Q. And that is the way you know you were in Red Fish Bay?

A. That is one way I remember. You don't keep track of every minute on the calendar; you haven't got time when you are fishing.

Q. I understand that. What time of day on the 13th did you go into Red Fish Bay?

A. Oh, that would be sometime in the early afternoon again.

Q. Early afternoon? A. Yes.

Q. All right. And then you said that you saw Mr. McKenzie that day? A. On the 13th?

(Testimony of Richard Harris.)

Q. Yes.

A. Yes. That is the day he come aboard the boat.

Q. And had dinner with you? A. Yes.

Q. That was the evening meal, was it not?

A. Yes.

Q. When were you in Red Fish Bay—were you in Red Fish Bay at any time after that?

A. We were in Red Fish Bay after that; yes.

Q. When was that?

A. Oh, I think, when we come down from Whale Bay on the way to [122] town, on the Sunday afternoon, we stopped at Red Fish Bay and anchored in ten fathom anchorage there.

Q. Did you go in the closed area at Red Fish Bay on the 15th? A. The 15th, Sunday?

Q. Yes. A. I believe we did; yes.

Q. And you saw Mr. McKenzie?

A. Couldn't help but see him in there.

Q. Just answer the question. You saw Mr. McKenzie on the 15th of August, 1948?

A. Yes, I believe we did.

Q. Did you talk with him?

A. Well, we talked with him every time we come in the Bay except the first time.

Q. Then you talked with him on August 15th?

A. Yes.

Q. And was Kurt Nordgren there when you talked with him?

A. He was on the boat with us.

(Testimony of Richard Harris.)

Q. You mean Mr. McKenzie was on the boat that time?

A. Whenever we come in there, he come down and hollered for us to come down and get him.

Q. Did you fish on the 16th?

A. No. On the 16th we was on our way to Petersburg.

Q. When you saw Mr. McKenzie, Richard, tell the jury whether you knew or thought he was a stream watchman? [123]

A. Well, you can't tell whether a man is a stream watchman or not. Lots of people camp on the beach. When we come in we hollered to him the first time to find out who he was, if he was stranded or needed help. We always do that in Alaska.

Q. You knew he was a stream watchman?

A. Certainly; but that doesn't make us not talk to him.

Q. Now, tell the jury whether or not you were convicted in the United States Commissioner's Court at Sitka, Alaska, on or about the 27th day of July, 1944, for illegal fishing.

A. Yes. I was guilty and I plead guilty.

Mr. Baskin: That is all.

Mr. Stabler: That is all. Call Chris Dahl. I would like to call Mr. Dahl a little out of order, if the Court please; he wants to get away this afternoon.

The Court: You may do that.

CHRIS DAHL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on:

Direct Examination

By Mr. Stabler:

Q. What is your name?

A. Chris Dahl.

Q. Where do you live, Mr. Dahl? [124]

A. Petersburg.

Q. How long have you lived in Petersburg?

A. Since 1925.

Q. What is your business down there?

A. I am a cannery operator.

Q. What is the name of your business?

A. Kaylor-Dahl Fish Company, Incorporated.

Q. Are you pretty well acquainted around Petersburg? A. Yes.

Q. Do you know Kurt Nordgren?

A. Yes, sir.

Q. How long have you known Mr. Nordgren?

A. Oh, I don't know; it must be fifteen years anyway; fifteen or twenty years. I don't remember exactly when I first got to know him, but I know it was a long time ago.

Q. Do you know Richard Harris?

A. Yes, sir.

Q. How long have you known him?

A. Ever since we were kids around Petersburg.

Q. Do you know his brother Hugh Harris?

A. Yes. I know both of them—Richard and Hughie.

(Testimony of Chris Dahl.)

Q. That is Hugh? A. Yes.

Q. How long have you known him?

A. I have known him too since he was a small boy. [125]

Q. Do you know the general reputation of Petersburg, Alaska—that is, what people generally say—of Kurt Nordgren of being a peaceable and law-abiding person?

Mr. Bailey: Your Honor, I am going to object to that for two reasons.

The Court: Objection sustained.

Mr. Bailey: I am going to object to “do you know.” It should be “have you heard.”

The Court: Not necessarily. Of course it has to be based on what he heard. But if the form of the question is if he knows what the reputation is—reputation is what he hears—of course it is permissible. But it has to be limited to a trait involved in this prosecution.

Mr. Stabler: I think——

The Court: This isn't a fight or homicide.

Mr. Stabler: I will say “law-abiding.”

The Court: It has to be a specific trait—in this case, honesty and integrity.

Mr. Stabler: Exception.

Q. Do you know the general reputation of Petersburg, Alaska, of the veracity——

Mr. Stabler: Is that what the Court said?

The Court: No. Honesty and integrity.

Q. Honesty and integrity of Kurt Nordgren; do you know that? A. Yes. [126]

(Testimony of Chris Dahl.)

Q. Is it good or bad? A. It is good.

Q. Do you know the general reputation at Petersburg of Hugh Harris—the same trait?

A. It is good.

Q. And Richard Harris? A. Good.

Mr. Stabler: You may cross-examine.

Cross-Examination

By Mr. Bailey:

Q. You have lived in Petersburg since 1925?

A. That is right.

Q. You have known the defendant Kurt Nordgren since about 1935?

A. Yes; I knowed him in 1935.

Q. Who have you talked to about his reputation? Tell me some of the people you have talked to.

The Court: You have to make that question more specific—reputation for honesty and integrity, not something else.

Q. Tell me who you talked to about Kurt Nordgren's reputation for honesty and integrity.

A. That is hard to say. Since 1935 I have talked to hundreds of people. I just can't pick out—

Q. Just tell me a few of them. What were their names? If you can't, it is all right.

A. I can't think of any names right off hand.

Q. Now, did you know that Kurt Nordgren was arrested in Sitka, Alaska, in 1944 for illegal fishing?

A. Yes.

(Testimony of Chris Dahl.)

Q. Did you know that he was arrested in 1947, for illegal fishing, in Sitka, Alaska, and convicted?

A. I heard something about it; yes.

Q. I asked if you knew it?

A. No. But I did hear something about that.

Mr. Bailey: That is all.

Mr. Baskin: Wait just a minute.

Mr. Bailey: Your Honor, I don't think this man is competent to testify to the honesty and integrity of this individual. He has talked to hundreds of people and can't cite one instance. I ask that it be stricken from the record.

The Court: Well what is your testimony that the defendant has a good reputation for honesty and integrity, based on?

A. Well, as I say, I have known the man for years, and when I come to think of it—you know it is kind of hard to say. I might have talked to you or to anyone about Kurt Nordgren years ago, but it is awful hard to pick just one person. If I have a little time to sit down and think about it, I [128] might be able to write down one hundred. I can say absolutely truthfully that Kurt Nordgren——

The Court: It is not what he is in your opinion, not what you know him to be. It is reputation now and that is something else. I didn't ask you the difficulties of remembering anybody's name. But I asked you on what your testimony is based.

A. His reputation is good in Petersburg.

(Testimony of Chris Dahl.)

The Court: On what is that based; that statement you just made that his reputation is good, what is that based on? In other words, is it your own opinion, what you yourself know, or what you heard others say?

A. It is probably both what I heard others say and what I know. In other words, I have never heard anyone referring to Kurt Nordgren as a criminal or as a person who you have to be ashamed to associate with or anything of that sort.

The Court: Did you ever hear the word integrity used?

A. Yes.

The Court: What does it mean?

A. Well, it means—oh, I can't—I know what it means, but I can't explain it.

The Court: Then, as I understand it, your testimony is based partly on what you know or what you believe, and partly on what others have said; is that it?

A. That is right. [129]

The Court: Well, how much of it is based on your own knowledge or belief?

A. Well, I would say that ninety per cent of it is anyway.

The Court: On what you yourself know?

A. Yes.

The Court: Well, I think under those circumstances the testimony will have to be stricken.

Mr. Stabler: We take an exception.

(Testimony of Chris Dahl.)

The Court: The testimony is stricken, and the jury is instructed to disregard it, unless you want to cross-examine as to what that ten per cent is based on; ninety per cent is of his own knowledge.

Redirect Examination

By Mr. Stabler:

Q. Mr. Dahl, have you heard people say generally in Petersburg that Mr. Nordgren is an honest man? A. That is right.

Q. That particular word, "integrity," though you might not have used it, you know what it means, do you?

A. I couldn't give you the exact definition of it, but—oh, I guess I am just a little rattled; I can't seem to think.

Q. You say about ten per cent of what you know about Kurt Nordgren is what you have heard others say? A. Yes. [130]

Q. And that ten per cent is where hundreds of people have discussed this Nordgren?

A. Probably hundreds during the time I have known him.

Q. About the traits of honesty and integrity?

A. That is right.

Q. And that ten per cent takes in quite a number of people; is that right? A. It sure does.

Q. They generally say of him in Petersburg that he is an honest man and a man of integrity; is that right? A. Yes.

(Testimony of Chris Dahl.)

Q. And you know him personally yourself and you also have your own opinion? A. Yes.

Mr. Stabler: I think that is all.

The Court: That part about his own opinion is stricken, and the jury is instructed to disregard it.

Mr. Stabler: Does the Court instruct the jury they may consider the other?

The Court: I have only stricken that part which is of his own knowledge; that is wholly incompetent.

(Witness excused.) [131]

KURT NORDGREN

called as a witness on his own behalf, being first duly sworn, testified as follows on:

Direct Examination

By Mr. Stabler:

Q. What is your name?

A. Kurt Nordgren.

Q. Where do you live, Mr. Nordgren?

A. Petersburg, Alaska.

Q. How long have you lived in Petersburg, Alaska?

A. Nineteen years this year.

Q. And do you have a family down there?

A. Yes.

Q. What does your family consist of?

A. I have got——

(Testimony of Kurt Nordgren.)

Mr. Baskin: We object. It is immaterial.

The Court: Objection sustained.

Q. Are you a married man? A. Yes.

Mr. Baskin: We object to that.

The Court: I think it is highly improper.

Mr. Baskin: Whether he has a wife and family are not material.

The Court: The jury cannot take extraneous matters of that kind into consideration. I think in the face of the Court's ruling a moment ago—

Mr. Stabler: I would like to take an exception on the ground that a man with a family—

Mr. Baskin: We object to counsel reciting—

The Court: Yes. I have already ruled that matters of that kind are always improper to be presented to a jury because of the fact that the jury is instructed that they must not take matters of that kind or matters touching their sympathy into consideration. Any evidence of that kind in any case ignores the Court's instructions and the oath they have taken to decide the case on the law and the evidence.

Mr. Stabler: We take exception to the Court's ruling on the ground—I would like to state my grounds, if the Court please.

The Court: Well, perhaps—you may approach the bench.

Whereupon, Mr. Baskin, Mr. Stabler and the court reporter approached the bench, out of hearing of the jury, and the following took place:

(Testimony of Kurt Nordgren.)

Mr. Stabler: The grounds are that, if a man is shown to have a family consisting of a wife and children, it is evidentiary of the fact that such a man is less apt to commit an offense such as that charged than if it would be a man without any such family responsibilities.

The Court: Conversely, if it was a person of bad associations, the prosecution would be able to prove that. That is what makes it wrong. [133]

Whereupon, Mr. Baskin, Mr. Stabler and the court reporter withdrew from the bench and were again within hearing of the jury, and the trial proceeded as follows; the direct examination of the defendant being continued by Mr. Stabler:

Q. What is your occupation in Petersburg, Mr. Nordgren? A. I am a fisherman.

Q. How long have you been engaged in that occupation? A. About twelve years.

Q. What kind of fishing do you do?

A. Salmon and halibut.

Q. Do you have a boat? A. Yes, I have.

Q. What is the name of it? A. "Lois W."

Q. How long have you had that boat?

A. I just bought it two years ago.

Q. What kind of a boat is that?

A. A "V" bottom, combination halibut and seiner.

Q. Calling your attention to Monday, the 9th day of August, 1948, which, I believe, was the

(Testimony of Kurt Nordgren.)

opening day for fishing salmon in Southeastern Alaska, do you recall that date?

A. Yes, I do.

Q. What did you do on that date with reference to going out fishing or preparing for fishing?

A. We was looking for fish. [134]

Q. Where did you go—when did you leave Petersburg?

A. We left Petersburg on the day before.

Q. On August the 8th? A. Yes.

Q. On what boat? A. The "Lois W".

Q. And who was with you?

A. Richard and Hughie Harris.

Q. Was anybody else on your boat?

A. No, sir.

Q. Where did you go?

A. We took in some of the country coming from Frederick Sound, Chatham Strait, and wound up in Red Fish Bay on the 9th.

Q. What time?

A. I would say it was around noon.

Q. What were you doing in Red Fish Bay, and what part of Red Fish Bay were you in?

A. We was in the whole bay.

Q. What did you go there for?

A. Looking for fish. That is what we always do. Any fishermen take a look in all the bays before they go fishing.

Q. Was it unlawful to fish in Red Fish Bay at that time?

(Testimony of Kurt Nordgren.)

Mr. Baskin: Your Honor, I would like counsel to specify what part.

The Court: Yes. That takes in a little too much.

Mr. Stabler: I am going to.

Q. I will ask you to step down here, Mr. Nordgren. Stand over there so the jury can see.

A. This whole country outside, Pacific Ocean, Chatham Strait, Frederick Sound, Red Fish, clear out to here, you can fish anywhere. This is closed north of that line. But we always look for fish coming in and going out. It is no crime to be there.

Q. On Monday, the 9th of August, you went over into Red Fish Bay?

A. Yes, we did go in there.

Q. Did you go north of this red line here?

A. Yes, we did.

Q. Which is—that red line is that what—what do you call that?

A. That is the Fisheries' markers there.

Q. What part do you call that?

A. The second narrows.

Q. That red line is on the second narrows?

A. Yes.

Q. When you refer to the second narrows, you refer to——

A. North of the second narrows is closed at all times.

Q. What do you call the first narrows?

A. Coming in there past them islands.

(Testimony of Kurt Nordgren.)

Q. Farther south is the first narrows and where the red line [136] is is the second narrows?

A. That is right.

Q. And it was lawful to fish there south of that red line?

A. Absolutely. We fished there lots of times, lots of years.

Q. Did you go north of that red line on the 9th of August? A. Yes, we did.

Q. What for?

A. To see what was up in the bay.

Q. What is the habit or custom of fish with respect to tides?

Mr. Baskin: We object. He isn't qualified as an expert as to the nature of fish.

The Court: It is getting a little far——

Mr. Baskin: It is immaterial, and we object.

The Court: This is not a case of violation of fisheries laws.

Mr. Stabler: It would be proper to show what he was up there for.

The Court: If it was cross examination, but not as part of your case.

Q. Did you see anybody up there on August 9th? A. Yes.

Q. Who? A. Bill McKenzie.

Q. What were the circumstances? I will ask you first if you knew him before that? [137]

A. No.

Q. What were the circumstances under which you met and saw him that day?

(Testimony of Kurt Nordgren.)

A. We went up in the bay. We saw a couple fish jumping, and we went up, and we saw a tent on the beach. We didn't know who it was. You meet strangers all over Alaska.

Mr. Bailey: I am going to object to the witness testifying in narrative form unless he is more responsive.

The Court: Unless there is some good reason, he should testify responsively, and not in narrative form.

Q. Did you have any conversation with Mr. McKenzie on August 9th—that would be Monday?

A. Yes.

Q. What was it?

A. He come down on the beach from the tent. He had a boat alongside. We always anchor there. I didn't go ashore. He talked from the beach right aboard the boat.

Q. What about.

A. I asked who he was and if he was stranded or what. That is all.

Q. What did he say?

A. He said he was stationed there.

Q. Now, about what time of the day was that?

A. That was around noon, I would say.

Q. Did you do any fishing there that day north of this second [138] narrows or this red line shown on the chart? A. No.

Q. Did you do any fishing that day at all?

A. Yes.

(Testimony of Kurt Nordgren.)

Q. Where? A. Outside; yes. Outside——

Q. Come down here.

A. Right off these points right here on the outgoing tide; the first narrows; sometimes off of this point.

Q. Between the first and second narrows?

A. That is right. (Witness resumed the witness stand.)

Q. Did you catch any fish? A. Yes.

Q. Did you go into the bay north of this red line after that? A. Yes, we did.

Q. That day? A. Yes, we did.

Q. What time did you get up there?

A. It was toward evening.

Q. How long did you stay there?

A. Not very long; maybe half an hour or so.

Q. Did you do any fishing that time north of the red line? A. No.

Q. After the half-hour what did you do?

A. The watchman came out, and I went ashore. I talked to him. [139] His general conversation—he was glad to see somebody come in there, so we talked for a little while; and then we went out again.

Q. Did you talk to him about any arrangements for letting you fish there? A. No.

Q. What did you talk about?

A. The weather, fishing, and how much fish has come up the stream, and general conversation when you meet a man on the beach.

(Testimony of Kurt Nordgren.)

Q. Did you at that time or at any other time tell him he could make four hundred and fifty or five hundred dollars or any sum like that?

A. No, I didn't.

Q. If he allowed you to fish in there?

A. No, I didn't.

Q. Did you have any arrangement of any kind with Mr. McKenzie to let you fish in there in violation of the law? A. No, I didn't.

Q. After you were there a half-hour, where did you go? A. Back outside.

Q. What did you do?

A. We made one more haul outside that line and anchored in ten fathom anchorage.

Q. Where is that? [140]

A. That is outside.

Q. Come down and show us where it is.

A. Right in here. That is the anchorage. You can anchor almost any place inside the slope of the ocean.

Q. You stayed there that night, or how long?

A. Until about midnight, waiting for the tide.

Q. Then what did you do?

A. Headed for Petersburg.

Q. Did you make any sets on your way to Petersburg? A. One.

Q. Where? A. Shipley Bay.

Q. Can you point that out to us on this chart?

A. It is not on there.

Q. Here is No. 8252?

(Testimony of Kurt Nordgren.)

A. It is not on that one.

Q. Generally, where is it?

A. You have got to go around Cape Ommaney, across Chatham to Cape Decision, and it is about a two-hour run up to Sumner.

Q. You made a haul there? A. Yes.

Q. Where? A. Shipley Bay.

Q. Where did you go from there?

A. To town. [141]

Q. Where? A. Petersburg.

Q. When did you get in Petersburg?

A. Seven-thirty or eight o'clock.

Q. Did you have any fish? A. Yes.

Q. How many?

A. They weighed them. The approximate number was eleven or twelve hundred, maybe thirteen.

Q. What did you do? A. We sold them.

Q. Who to? A. Kaylor & Dahl.

Q. Dahl, who testified here? A. Yes.

Q. Do you recall how much you got for your fish?

A. Seventeen hundred and some dollars.

Q. Were any of those fish caught north of this red line in Red Fish Bay?

A. No, it wasn't.

Q. Where were they caught?

A. They was caught outside the red line and at Shipley Bay.

Q. Did you say what time you got into Petersburg? A. Seven-thirty or eight o'clock.

Q. Tuesday, the 10th? [142]

(Testimony of Kurt Nordgren.)

A. On the 10th in the evening.

Q. What did you do after that?

A. We unloaded the fish that night.

Q. And then what?

A. Then we went home.

Q. You all live in Petersburg?

A. That is right.

Q. Did you go out again?

A. Not that night; no.

Q. When did you go out next?

A. We went and left Petersburg the 12th.

Q. You were in Petersburg all day then on the 11th, Wednesday? A. Yes.

Q. Did you do anything there to get ready for the next trip? A. Yes.

Q. What?

Mr. Baskin: We object to this line of questioning. It has nothing to do with this case.

The Court: The preparation for going out again—I can't see its materiality or relevancy.

Q. You were in Petersburg all day the 11th?

A. Yes.

Q. What time did you leave Petersburg on the next trip? A. Around noon on the 12th.

Q. That would be Thursday? [143]

A. Yes.

Q. Where did you go?

A. We was going to go out fishing again.

Q. Where did you head for to go fishing?

A. Red Bluff Bay.

(Testimony of Kurt Nordgren.)

Q. Is that on this map? A. No, it isn't.

Q. Where is it?

A. In Chatham Strait. It is about eighty or ninety miles from Petersburg in Chatham Strait.

Q. How about from Red Fish Bay?

A. About fifty or sixty.

Q. This is Red Bluff Bay?

A. Yes. It is a long ways from there.

Q. What did you do there?

A. We got there in the dark so we anchored up until next morning.

Q. Until the morning of the 13th?

A. Yes, sir.

Q. Did you make any sets there?

A. No. We looked the bay over and then left.

Q. Where did you go on Friday, the 13th?

A. From there right around the corner, and there is Sockeye Bay, and we looked there, and from there we went to Pillar Bay looking for fish. [144]

Q. What time did you get into Pillar Bay?

A. That was in the morning around eight or nine o'clock, I would say.

Q. Did anything occur there that you remember?

A. There was a Fisheries' plane come in, and we talked to them.

Q. That is in Pillar Bay?

A. That is in Pillar Bay in Chatham Strait.

Q. Where did you go from Pillar Bay?

(Testimony of Kurt Nordgren.)

A. To Red Fish Bay.

Q. What time did you get to Red Fish Bay?

A. Early afternoon.

Q. Of Friday, the 13th?

A. That is right.

Q. Were you in Red Fish Bay Thursday, the 12th of August, 1948? A. No, sir.

Q. So you got up there on Friday, the 13th, about what time?

A. Early in the afternoon.

Q. What did you do up there?

A. We went in and looked and saw some fish jumping. The tide was wrong so we beat it up in the bay.

Q. What did you do up there?

A. Anchored and was going to have supper.

Q. Will you show us where you anchored? [145]

A. We anchored right up in here in the two and one-half fathom mark up here.

Q. You are talking about Friday, the 13th?

A. Yes, sir.

Q. Did you see Mr. McKenzie up there?

A. Yes, sir.

Q. How far was his tent from where you anchored?

A. Maybe three hundred feet, four hundred feet.

Q. Did you have any conversations with him?

A. Yes.

Q. What were they?

(Testimony of Kurt Nordgren.)

A. He come down on the beach there, and I went ashore in the skiff to get him, and he had supper with us.

Q. Tell what you did there that night; what conversations; what you did.

A. He come aboard. We talked a while. He had supper with us. We asked him if he needed any grub. We gave him some. We asked if he wanted beer. He had beer and a couple drinks of whiskey. We gave him some groceries and put him ashore.

Q. How did you happen to give him groceries?

A. He asked if we could. We just came from town.

Mr. Bailey: We object. It is immaterial and not in issue at all.

The Court: It has been testified to. I don't see how it can prove or disprove anything. Since it has been gone [146] into, you may go into it. Try to make it brief.

Q. You say he asked for these groceries?

A. That is right.

Q. What groceries did you give him?

A. Some canned chicken, corned beef, bologna, carrots and celery, and I am not sure if we gave him a loaf of bread. That is about all.

Q. How long did you stay there?

A. We didn't stay long. After we ate supper we went right out again.

Q. What time was it he was aboard the boat?

A. That was in the afternoon.

(Testimony of Kurt Nordgren.)

Q. You say right after you had your dinner, your meal, you went out?

A. I took him ashore, went back, and we hauled anchor and left.

Q. Where did you go?

A. We made one set outside the marks that evening and then anchored at ten fathom anchorage.

Q. You went out of the line at the second narrows?

A. Yes.

Q. And anchored where?

A. Ten fathom anchorage.

Q. How long did you stay at that anchorage?

A. All night, until ten o'clock in the morning.

Q. Then where did you go?

A. Whale Bay.

Q. Where is that?

A. Up the north coast about a two-and-a-half hour run.

Q. Did you do any fishing?

A. We fished all day.

Q. In Whale Bay?

A. Yes, we did.

Q. That would be Saturday?

A. That was Saturday.

Q. Now, where did you stay that night?

A. We stayed there that night.

Q. In Whale Bay?

A. That is right.

Q. Where did you go next?

A. We was heading for Petersburg again.

Q. And on Sunday, the 15th, what did you do?

A. We was on our way to town, following a

(Testimony of Kurt Nordgren.)

southwest sea, and decided to go into Red Fish Bay and wait for weather.

Q. How was the weather?

A. It was picking up.

Q. Did you see Bill McKenzie? A. Yes.

Q. Tell the jury about that.

A. We went in the bay and dropped the hook. He came aboard [148] and had a couple drinks. He asked for a fish. We opened up and got one for him on the ice. He said he was afraid of bears up the creek and couldn't get one.

Q. Did you get any fish that day?

A. No. It was a Sunday. Everything is closed.

Q. How long did you stay there?

A. Just a little while, and we pulled out to the anchorage to watch the weather.

Q. What time did you go in there?

A. I guess around one o'clock.

Q. I mean how long were you in the bay north of the red line? A. Maybe an hour.

Q. And you pulled out to the anchorage?

A. At ten fathom.

Q. How long did you stay at ten fathom?

A. We stayed there all that night.

Q. Then where did you go on the 16th?

A. We pulled out for Petersburg again.

Q. I think the season was closed on the 16th?

A. We didn't know the season was closed on the 16th. It was closed we found out when we got to town.

(Testimony of Kurt Nordgren.)

Q. Did you do any fishing north of this red line in the second narrows on the 15th of August?

A. No, sir.

Q. On the 16th of August? [149]

A. No, sir.

Q. Or any other time in August?

A. No, sir.

Q. You heard the testimony of Mr. McKenzie here about you offering him two one-hundred-dollar bills? A. Yes, I did.

Q. Is that true or false?

A. I don't see how it could be true; I didn't give it to him.

Q. Did you have any arrangement whatever with Mr. McKenzie to allow you or your boat or your crew to fish or take fish north of the second narrows, where this red line is, on August the 9th, on August the 12th, 13th, 15th or 16th, or at any other time? A. No, sir.

Q. So, on the 16th, you say, you went to Petersburg? A. That is right.

Q. And did you ever go back to Red Fish Bay after that time? A. Yes.

Q. When?

A. After the season opened again.

Mr. Baskin: Your Honor, I don't see where that is material.

The Court: Yes—I don't either; and let's try to shorten this up.

Q. I mean, did you ever see Mr. McKenzie

(Testimony of Kurt Nordgren.)

again in Red Fish [150] Bay after Sunday, August 15th? A. No, I didn't.

Mr. Stabler: You may cross-examine.

Cross-Examination

By Mr. Baskin:

Q. Kurt, you said that you saw Mr. McKenzie there on the beach on August 9, 1948, at Red Fish Bay? A. Yes, sir.

Q. And you knew he was a stream watchman?

A. I didn't when I come in there; no, sir.

Q. But after you got into the bay you learned he was a stream watchman?

A. Yes; we learned he was.

Q. You saw the Fish and Wildlife boat there on the beach?

A. We didn't know it was a Fish and Wildlife boat.

Q. But you knew he was a stream watchman, didn't you? A. After he told us.

Q. He told you?

A. When we talked to him, he did; yes.

Q. When did he tell you that?

A. In the afternoon.

Q. That was the second time you went into the bay on August 9th? A. Yes. [151]

Q. And when you went up on the beach to see him? A. Yes.

Q. Up at the tent?

A. I wasn't up at the tent.

Q. You were there by the beach?

(Testimony of Kurt Nordgren.)

A. Yes.

Q. You were there and talked to him alone?

A. That is correct.

Q. How long did you say you were in Red Fish Bay on August 9th?

A. Only about half an hour.

Q. The first time? A. Yes.

Q. What time of the day did you say that was, about noon? A. Yes.

Q. And you left and came back again?

A. Yes.

Q. What time was that?

A. That was in the evening.

Q. Could you fix the time a little more than just in the evening?

A. Maybe it was around seven o'clock.

Q. That would be seven p.m.?

A. That is right.

Q. And how long did you stay in there at that time? [152]

A. It wasn't more than an hour, I don't think, if it was that long.

Q. Then you went out again?

A. That is right.

Q. You didn't return? A. No, sir.

Q. Then when was the next time that you went into Red Fish Bay; that is, into the closed area of Red Fish Bay? A. On the 13th.

Q. That is August the 13th? A. Yes, sir.

Q. And you said that was during the early noon?

A. Around noon, I would say.

(Testimony of Kurt Nordgren.)

Q. And that is the time that McKenzie went down to the boat and went aboard and had dinner with you; is that correct? A. Yes, sir.

Q. And you engaged in conversation with him at that time, did you? A. Yes, sir.

Q. And you knew at that time that he was a Fish and Wildlife stream watchman?

A. Yes, sir.

Q. Tell the jury approximately where Whale Bay is located.

A. Whale Bay is about two and a half hours northwest of Red Fish, going up the coast towards Sitka. [153]

Q. About what is the distance from Sitka to Whale Bay?

A. I think that is around a four-and-a-half to five-hour run.

Q. A four-and-a-half to five-hour run?

A. Yes.

Q. Did you catch any fish there?

A. Yes; on Saturday.

Q. And returned down to Red Fish Bay, did you not? A. That was on a Sunday.

Q. And you didn't fish there in Red Fish Bay on Sunday? A. No, sir.

Q. Then you went from Red Fish Bay to Petersburg? A. That is right.

Q. You said you didn't fish in Red Fish Bay on that occasion? A. No, I didn't.

Q. On Sunday? A. No, I didn't.

(Testimony of Kurt Nordgren.)

Q. But you saw Mr. McKenzie? A. Yes.

Q. Where was he?

A. Standing on the beach. He hollered for us to come get him.

Q. Did you get him?

A. In the skiff and took him out.

Q. He was on your boat on Sunday?

A. Yes, sir.

Q. And you engaged in conversation? Did he have any dinner [154] that day?

A. I think we had some lunch on there.

Q. He ate with you?

A. I know we ate. It was rough coming down. That is one of the reasons we went in the Bay. That is the time he got a fish from us.

Q. You didn't fish any more after you came from Whale Bay? A. No.

Q. And you went to Petersburg and sold your fish? A. That is right.

Q. And that is the fish you got prior to going to Red Fish Bay on August 15th?

A. That is right.

Q. You didn't know Mr. McKenzie before, did you, Nordgren? A. Before what?

Q. Before August the 9th? A. No, sir.

Q. You had never seen him before?

A. No, sir.

Q. Mr. Nordgren, you don't know any reason why Mr. McKenzie would come in and testify in this court as he did, do you?

(Testimony of Kurt Nordgren.)

A. I wouldn't say; no.

Q. Now, tell the jury whether or not you were convicted in the United States Commissioner's Court at Sitka, Alaska, for illegal fishing on or about July 27, 1944? [155]

A. That is right.

Q. You were convicted for illegal fishing?

A. I plead guilty. I was guilty.

Q. Tell the jury whether or not you were convicted in the United States Commissioner's Court at Sitka, Alaska, for illegal fishing on or about the 26th day of August, 1947?

A. That is right. I was inside the white markers about two hundred yards.

Q. You mean you were within the red markers of Red Fish Bay? A. Yes.

Q. And that area was closed at that time to fishing? A. That is right.

Mr. Baskin: That is all.

(Witness excused.)

Mr. Stabler: May it please the Court, may we have a short recess to see if we have any more witnesses out there?

The Court: Have you?

Mr. Stabler: I would like to see if he is out there.

The Court: You can just call him.

CECIL OWSLEY

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination

By Mr. Stabler:

Q. What is your name? [156]

A. Cecil Owsley.

Q. And where do you live?

A. Petersburg.

Q. How long have you lived down there?

A. Well, it was 1940—September 30, 1940—when I blew up my last boat and went into the Petersburg Hospital, and I have been there ever since.

Q. What is your occupation?

A. Fisherman.

Q. What kind of fishing do you do?

A. I troll and fish halibut.

Q. You have been a member of this jury up to now?

A. Yes.

Q. That is why you are up here?

A. Yes.

Q. How long have you known Kurt Nordgren?

A. I couldn't say exactly how long I have known him. I guess I have known who he was since probably 1943, somewhere around that.

Q. Do you know Richard Harris?

A. Yes.

Q. Do you know his brother Hugh?

A. Yes.

Q. How long have you known those two brothers?

(Testimony of Cecil Owsley.)

A. I don't know. I don't believe I have been introduced to [157] them. You get to know them by sight. Somebody will say, "That is Richard Harris," or Hugh Harris. That has been for four or five years.

Q. Do you know the general reputation at Petersburg of Kurt Nordgren for being a person of honesty and integrity? A. Yes.

Q. Do you know—yes or no——

A. Yes; I believe I do. I think his character is good.

Mr. Stabler: You may cross-examine.

Mr. Bailey: Your Honor, before we start examining this witness, I think the answer he made was irresponsible to the question.

The Court: That part of his answer, that he thought it was good, is stricken, and the jury is instructed to disregard it.

Mr. Stabler: Do you know his reputation for those traits?

A. Yes. Generally I would say he is all right, a good guy.

Mr. Bailey: We are not concerned with that.

A. I think he is honest. I don't think, if you would stack up a million dollars, that he would take a one of them.

The Court: You are not asked for your own opinion. The jury is instructed to disregard it.

A. The general reputation of Petersburg is that he is honest. If that is what the question is, why,

(Testimony of Cecil Owsley.)

that is my opinion of [158] the people's opinion of Kurt Nordgren in Petersburg.

Mr. Stabler: Also, how about his integrity?

A. It is good.

Mr. Stabler: That is all.

Mr. Bailey: I am going to ask that the part be stricken about his opinion.

The Court: I have already ruled, and the jury is instructed, that any part of the testimony of the witness based on his own opinion is stricken, and the jury is instructed to disregard it.

A. May I ask a question? How could I tell except through my opinion?

The Court: The law doesn't allow you to do that. It is not what you think, but what people of Petersburg think. It is not what you think. It is what people of Petersburg think. So, if you are going to testify as to reputation here, you have to confine yourself to what you know, not what you believe, but what you believe the people of Petersburg believe. That ought to be plain enough. You may proceed.

Cross-Examination

By Mr. Bailey:

Q. How long have you known Mr. Nordgren?

A. Since about 1943, somewhere around that.

Q. How well do you know him? [159]

A. I couldn't say too well. I know who he is. Like I said when I was called on the jury, he is not an intimate friend or anything of that kind. I know

(Testimony of Cecil Owsley.)

him on the street and dealings he has and knowing him as a citizen.

Q. Tell me this—is your testimony based on—his honesty and integrity—your opinion or what you know as to what people of Petersburg think?

A. As to what I know as to what people of Petersburg thing.

Q. Tell me, who have you talked to in Petersburg regarding his honesty and integrity?

The Court: Not honesty and integrity. His reputation for honesty and integrity.

Q. His reputation for honesty and integrity?

A. It is pretty hard for me to name the different people. I hadn't expected any such questions. But I have never heard anybody in Petersburg say anything against him.

Q. Answer my questions. Is your answer you can't tell me any person that you have talked to; is that right?

A. I wouldn't say that is right, because I know I have talked to some people about him. Off hand I couldn't state names. I don't make a habit of going around and talking to people and asking about people.

Q. Tell me what names—or can't you answer?

A. It is pretty hard to answer.

Q. Name me one. [160]

A. There would possibly be lots of names if I started naming people.

Q. I asked you the question—name me one.

(Testimony of Cecil Owsley.)

A. I have talked to my wife for one thing.

Q. How did you happen to talk to her about it? What was the occasion?

A. Just like I talk to her about any other one thing.

Q. How did you happen to be talking about Kurt Nordgren whom you didn't know other than to be pointed out to you?

A. How would you happen to talk about anything?

Q. I am asking the questions; you answer them.

A. Just like anybody, ordinary conversation. I talked to Curly McDonald. Before I had my boat built he worked for him.

Q. How did you happen to talk about him?

A. He wasn't available to work on my boat.

Q. Were you talking about labor or reputation for honesty and integrity?

A. Talking about labor.

Q. You can't tell me, outside of your own wife, anybody you talked to about Kurt Nordgren; is that true?

A. Honesty and integrity did not come up to be talked about. If it ever come up—it was not disputed; why talk about it?

Q. You don't know then; you haven't talked to anybody in Petersburg? [161]

A. I wouldn't say I haven't talked to anybody.

Q. Then you can't tell me anybody?

A. I am not going to tell you anybody.

(Testimony of Cecil Owsley.)

Q. Have you discussed this case with anyone?

A. Not before I come up; but I have talked to Kurt and the Harris boys about it.

Q. When is the first time you discussed it, before or after you were called on the jury?

A. After.

Mr. Bailey: Your Honor, I ask that the witness' testimony be stricken. He hasn't talked to anybody in Petersburg about the defendant's honesty and integrity. I move it be stricken.

Mr. Stabler: I think he has, but he hasn't named any particular individual. He seems to be a little uncertain as to what general reputation is, but I think he answered sufficiently to let it go to the jury.

The Court: It is rather difficult now to be able to say what his testimony amounts to on this point. It is obvious that he has misunderstood what reputation evidence means; and I don't know how much of his testimony relates to what his misconception of reputation testimony was, and it is pretty hard to analyze. He finally wound up by saying he wouldn't answer. If he won't answer, I don't see what good his testimony is, unless you want to examine him further. [162]

Mr. Baskin: This witness testified in certain words he had never talked with anyone about Kurt Nordgren's reputation for honesty and integrity.

The Court: I think he did say that. You have to consider that in connection with his other state-

(Testimony of Cecil Owsley.)

ments, some of which may appear to be contradictory. But if you want to examine him further——

Mr. Stabler: Yes. Did you ever hear anyone in Petersburg say anything against Kurt Nordgren for honesty and integrity? A. No.

Mr. Stabler: I think that is competent.

Mr. Bailey: I move it be stricken.

The Court: It is nevertheless admissible.

Mr. Bailey: What about his original testimony?

The Court: Do you wish to go further into his previous testimony, or do you wish to rely on negative testimony?

Mr. Stabler: What the negative testimony is, in a small town, I think that is material.

The Court: In view of the fact, that as the District Attorney mentioned a moment ago, that he testified that he did not recall talking to anyone about the defendant's reputation for honesty and integrity, it appears to me that the motion will have to be granted unless, as I say, you wish to go into that further. [163]

Mr. Stabler: Mr. Owsley, have you talked with people in Petersburg or heard people in Petersburg talk to you or anybody else concerning the honesty and integrity of Kurt Nordgren?

A. I think I have heard them talk about it. But to state specifically who I heard talk about it, that is different. I do know about his honesty and integrity myself, and I don't see that that is hearsay.

The Court: It is not what you know. Reputa-

(Testimony of Cecil Owsley.)

tion evidence is hearsay, what other people say, not what you think, not what you know. In other words, this is one class of testimony based entirely on hearsay, what other people say. If you don't know who has said it, you don't have to state who.

A. I don't know who said it. But in a small town like Petersburg, if a person's character and honesty is not all right, you hear it immediately and, if it is all right, you don't hear much. People don't go around and brag on people that are good, but criticize those who are bad.

Mr. Stabler: You have never heard anyone in Petersburg say that Kurt Nordgren was not a man of honesty and integrity? A. That is right.

The Court: As I recall your testimony, so far as your positive or affirmative testimony is concerned, you don't recall a single person with whom you talked about the defendant's [164] reputation; but have you talked—do you know that you have talked with people about his honesty and integrity before this case came up?

A. Yes; I have talked to people about his honesty and integrity before this case came up. Things like that, you don't remember; I don't. I didn't think about coming up and having to talk about him in particular. But where you live in a small community, almost all the fellows around you talk about, at one time or another——

The Court: The question still is, while it might be true that people don't talk about anybody unless

(Testimony of Cecil Owsley.)

something comes up, nevertheless it is impossible now for the Court to tell whether you testified that you have heard the reputation of the defendant for honesty and integrity discussed by the people of Petersburg, or whether you don't remember it?

A. Well, I believe that I have, but I couldn't put down any specific dates or people I have talked to. It is one of those things it is hard to put your finger on. Unless you talk to somebody for a certain purpose, it is hard to get on the stand and swear you talked about a certain thing.

The Court: You don't have to give dates or names.

A. He asked me for names.

The Court: If you don't know, you can state you don't know.

A. I don't know when. I have talked to some people about him. [165]

The Court: Do you know how his reputation for honesty and integrity came up for discussion?

A. Well, at the time I was building my boat it came up because at that time I worked at the shipyard and I asked about him down there. At the time I built my boat he wasn't working at the shipyard and he wasn't available.

The Court: What did you ask at that time?

A. I asked about the man, his character and integrity. If you have a man building your boat, you don't want a crook; you want a man who will give you full benefit of your money.

(Testimony of Cecil Owsley.)

The Court: Did you inquire about his honesty and integrity, or whether he was a good boat builder? A. Both.

The Court: But not as to whether he was a good boat builder?

A. I say—both.

The Court: Do you want to examine him further?

Q. (By Mr. Bailey): Did you know that Kurt Nordgren was convicted of illegal fishing in Sitka in 1947?

A. I knew he plead guilty to a charge over there.

Q. How did you know that?

A. That is hearsay.

Q. Did you hear that at the same time you heard about his reputation for honesty and integrity?

A. No.

Q. That was a different time. How about 1944, did you know he had been convicted in Sitka for the same charge? A. I don't remember dates.

Q. How many times did you hear he had been convicted?

A. I know he beat a charge. Is that the same time as now?

Q. Just answer the question.

A. I don't know if this is the same charge.

Q. 1944—you know when that was, don't you? Just answer the question.

A. I don't know what happened in 1944.

Mr. Bailey: That is all.

Mr. Stabler: That is all. We will rest, if the Court please.

The Court: Do you have any rebuttal?

Mr. Baskin: No, we don't, your Honor.

Whereupon, court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and in the absence of the jury; whereupon, the trial proceeded as follows:

Mr. Stabler: If the Court please, I would like at this time to offer evidence of the record at Sitka, a certified copy showing in Count I the charge of illegal fishing committed on August 9, 1948.

The Court: I know about that. How do you contend, [167] on what ground do you contend, that it is admissible?

Mr. Stabler: That it is so connected with the crime charged here that I think the Court should have that for a proper instruction.

The Court: Do you mean it is a defense to this charge?

Mr. Stabler: No, I don't. Evidence of another offense is not evidence, because of the charge over there, that he is guilty in the charge in this case.

The Court: Let me understand this. What was the result of the trial?

Mr. Stabler: Not guilty on three counts on these specific dates charged here that they went in there and fished in that particular area north of that red line on the second narrows.

The Court: As I understand, you contend there is some instruction I should give on that?

Mr. Stabler: Yes.

The Court: What is it?

Mr. Stabler: Here is the instruction I would like to propose.

The Court: I am not going to give any such instruction as that. I don't think it is in the case.

Mr. Stabler: We take exception to the Court's refusing to admit the certified record of the jury at Sitka acquitting [168] Kurt Nordgren, Hugh Harris and Richard Harris of three counts of illegal fishing in Red Fish Bay on Baranof Island, Alaska, on August 9, 1948, on August 15, 1948, and on August 16, 1948, and for the refusal of the Court to give the Defendant's Requested Instruction No. 1.

The Court: You don't contend that, if they had been convicted, the United States Attorney could introduce that evidence?

Mr. Stabler: No. But the testimony purports that those men were fishing illegally up there on those dates and, because of its nature, being connected with the charge for which the defendant is on trial, it should be segregated so the jury will know how to consider the testimony in this case involving those charges of illegal fishing, and in particular that the evidence of illegal fishing has been admitted here but may only be considered by the jury in so far as it may prove or tend to prove the charge of bribery for which the defendant is here on trial.

The Court: That is proper.

Mr. Stabler: And that they are not to consider

evidence of illegal fishing on those dates to show that at other times or other places the defendant committed any other offense or that that other offense is any evidence of guilt in this particular charge.

The Court: He is only on trial here on one charge. [169] What the jury may speculate on something else not bearing on this case——

Mr. Stabler: We take an exception. I would like to renew my motion for acquittal on the grounds which I stated at the conclusion of the plaintiff's testimony.

The Court: The motion is denied. Call the jury.

Whereupon, the jury returned and all took their places in the jury box; the jury was duly admonished, and court recessed until 1:30 p.m., April 19, 1948, reconvening as per recess, with all parties present as heretofore and the jury all present in the box;

Whereupon, Stanley D. Baskin, Assistant United States Attorney, made the argument to the jury in behalf of the Government; and thereafter, Howard D. Stabler, attorney for the defendant, made the argument to the jury in behalf of the defendant;

Whereupon, court recessed for ten minutes, reconvening as per recess, with all parties present as heretofore and the jury all present in the box;

Whereupon, Stanley D. Baskin, Assistant United States Attorney, made the closing argument to the jury in behalf of the Government;

Whereupon, court recessed until called, reconvening at 3:35 p.m., April 19, 1948, with all parties present as heretofore and the jury all present in the box; respective [170] counsel were furnished copies of the Court's Instructions to the Jury, and the Court read his Instructions to the Jury.

The Court: Any exceptions?

Whereupon, Mr. Baskin, Mr. Bailey, Mr. Stabler and the Court reporter approached the bench, out of hearing of the jury, and the following took place:

Mr. Stabler: The defendant excepts to the refusal of the Court to give Defendant's Requested Instruction No. 1 and, as to Instruction No. 4, subdivision (2), that question is one of law and not of fact, and the law shows——

The Court: You say Instruction 4?

Mr. Stabler: Instruction 4 (2).

The Court: That sets out the essential elements.

Mr. Stabler: That the law shows that McKenzie is not such an officer. The defendant further objects to Instruction No. 6, commencing with the word, "Accordingly, you are instructed that William McKenzie was, at the time charged in the indictment, a person acting for and on behalf of the United States in the function of conserving and protecting the commercial salmon fisheries of Alaska, under and by authority of the Department of the Interior." For the reason that the proof of his position is that he was not an officer or person subject to bribery under the provisions of the law under which the indictment was brought. Defend-

ant further objects to Instruction No. 13 for the reason that it duplicates No. 12 and unduly [171] emphasizes the effect of previous convictions.

The Court: That refers to the witness. One refers to witnesses, and the other refers to the defendant.

Mr. Stabler: I think that is all.

Whereupon, Mr. Baskin, Mr. Bailey, Mr. Stabler and the court reporter withdrew from the bench and were again within hearing of the jury.

The Court: Ladies and gentlemen, if you agree upon a verdict before 5:00 p.m., the Court will receive it from you in open court. If, however, you do not agree upon a verdict until later, you will have the Foreman sign it, seal it in this envelope and keep it in his possession unopened. You may then leave the jury room and separate, but no juror shall say anything about the verdict. All of you must be in the jury box at 10:00 a.m. tomorrow morning, at which time the verdict will be received by the Court and read in the presence of the jury. The bailiffs may now be sworn.

Whereupon, the bailiffs were duly sworn to take charge of the jury, and the jury retired to the jury room at 3:56 p.m. in charge of the bailiffs to deliberate upon a verdict; whereupon Court adjourned until 10:00 o'clock a.m., April 20, 1949, reconvening as per adjournment with all parties present as heretofore and the jury all present in the box; whereupon, the following proceedings were had:

The Court: Ladies and gentlemen of the jury, have [172] you arrived at a verdict?

Mr. Foreman: We have, your Honor.

The Court: You may hand it to the Clerk. You may read the verdict.

Whereupon, the verdict was read by the Clerk, finding the defendant guilty as charged in the indictment.

(End of record.) [173]

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled case, viz. The United States of America vs. Kurt Gustaf Nordgren, No. 2505-B of the files of said court;

That I reported said case in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 162, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled case, to the best of my ability.

Witness, my signature this 2nd day of July, 1949.

/s/ MILDRED K. MAYNARD,

Official Court Reporter, U. S. District Court, First
Division, Territory of Alaska.

Copy hereof received July 5, 1949.

/s/ STANLEY D. BASKIN,

Assistant U. S. Attorney.

[Endorsed]: Filed July 5, 1949. [174]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled court, at Juneau, Alaska:

Please prepare and transmit to the United States Court of Appeals for the Ninth Circuit, to be filed and docketed in said appellate court, within the time provided by law, for use on appeal in the above entitled action, the following transcript of record on appeal:

1. Indictment.
2. Verdict.
3. Judgment and commitment.
4. Motion and supplemental motion for new trial.
5. Order denying motion and supplemental motion for new trial.
6. Notice of Appeal.
7. Reporter's Original Transcript of the trial, properly certified, including all evidence, exhibits and instructions, and objections to instructions, and defendant's requested Instruction No. 1; but not including opening statements of counsel, examination of jurors, or arguments of counsel.
8. This praecipe.

Dated: Juneau, Alaska, May 24, 1949.

/s/ HOWARD D. STABLER,
Attorney for Appellant.

Copy hereof received May 24, 1949.

/s/ STANLEY D. BASKIN,
Asst. U. S. Attorney.

Certified to be the Original Praecipe.

/s/ J. W. LEIVERS,
Clerk,

[Seal]: By /s/ P. D. E. McIVER,
Deputy.

[Endorsed]: Filed May 24, 1949. [175]

[Title of District Court and Cause.]

COURT'S INSTRUCTIONS TO THE JURY

No. 1

Ladies and Gentlemen of the Jury:

We have now reached the point in the trial of this case where it becomes the duty of the Court to instruct you as to the law that will govern you in your deliberations upon the facts of this case.

When you were accepted as jurors in this case you obligated yourselves by your oaths to well and truly try the matter in issue between the Government of the United States and the defendant, and a true verdict render according to the law and the evidence as given to you on the trial. That oath means that you will not be swayed by passion, sympathy or prejudice, and that your verdict will be the result of a careful consideration of all the evidence and the instructions of the Court as to the law.

It is not for you to say what the law is or should be regardless of any idea you may have in that respect. It is the exclusive province of the Court to declare the law in these instructions, and it is your duty as jurors to follow them in your deliberations and in arriving at a verdict.

On the other hand it is the exclusive province of the jury to declare the facts in the case, and your decision in that respect, as embodied in your verdict, when arrived at in a regular and legal manner, is final and conclusive upon the Court. Therefore probably the greater ultimate responsibility in the trial of the case rests upon you, because you are the triers of the facts.

No. 2

The indictment in this case charges that the defendant on or about August 12, 1948, in Division Number One of the Territory, committed the crime of bribery by offering and giving \$200 in lawful money of the United States to William McKenzie, a person then and there acting for and on behalf of the United States in an official function, under and by authority of the Department of the Interior, in observing the area of Red Fish Bay, then and there closed to commercial fishing for salmon, and in apprehending and arresting and causing the arrest and prosecution of all persons fishing illegally for salmon in said closed area, and in reporting and disclosing such violations to law enforcement officials, then and there knowing the said William McKenzie to be such a person, with the intent to

influence and induce the said William McKenzie to unlawfully refrain from arresting or causing the arrest or prosecution of the defendant for fishing illegally in such closed area and to omit to report and disclose such violation to law enforcement officials.

No. 3

Bribery, so far as material to this case, is defined by law as follows:

“Whoever shall offer or give * * * any * * * money * * * to any * * * person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof * * * with intent to influence him * * * or induce him to do or omit to do any act in violation of his lawful duty, shall be fined or imprisoned,” etc.

No. 4

The essential elements of the crime charged, all of which must be proved beyond a reasonable doubt before you can convict the defendant, are:

(1) That on or about August 12, 1948, the defendant offered or gave \$200 in lawful money of the United States to William McKenzie;

(2) That William McKenzie was then and there a person acting for or on behalf of the United States in an official function, under and by the authority of the Department of the Interior;

(3) That the defendant knew that the said William McKenzie was then and there acting as such;

(4) That the offer was made with the intent to influence and induce the said William McKenzie to refrain from performing said function.

No. 5

It is admitted that by a regulation of the Department of the Interior that part of Red Fish Bay involved in this case was an area closed to commercial fishing for salmon, and I instruct you that Red Fish Bay is in Division Number One of the Territory, and that the Department of the Interior is a department of the United States.

No. 6

You are instructed that at and before the time referred to in the indictment in this case it was the function of the United States, acting through the Department of the Interior, to conserve and protect the commercial fisheries of Alaska for the benefit of all the citizens of the United States, by adopting such means, by regulation or otherwise, as it deemed necessary; that among the means adopted was the closure of the upper part of Red Fish Bay to commercial fishing for salmon, and the appointment of William McKenzie as fishery patrol agent to prevent such commercial fishing by arresting or causing the arrest of any person fishing or attempting to fish therein. Accordingly, you are instructed that William McKenzie was, at the time charged in the indictment, a person acting for and on behalf of the United States in the function of conserving and protecting the commercial salmon fisheries of

Alaska, under and by authority of the Department of the Interior.

No. 7

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant on or about August 12, 1948, offered or gave \$200 to William McKenzie, then and there a person acting for or on behalf of the United States, under and by authority of the Department of the Interior, in apprehending or arresting or causing the apprehension, arrest or conviction of persons fishing commercially for salmon in the closed waters of Red Fish Bay, knowing that he was such a person, with the intent to influence or induce the said William McKenzie to refrain from apprehending or arresting or causing the apprehension, arrest or conviction of said defendant if he should fish commercially for salmon in such waters, or to omit to report or disclose such violation to law enforcement officials, you should convict him; but if you do not so find or have a reasonable doubt thereof, you should acquit him.

No. 8

The law presumes every person charged with crime to be innocent and, hence, the defendant is entitled to the benefit of this presumption until it has been overcome by evidence beyond a reasonable doubt. This rule as to the presumption of innocence is a humane provision of the law intended to guard against the conviction of innocent persons, but it is not intended to prevent the conviction of any person

who is in fact guilty or to aid the guilty to escape punishment. [179]

No. 9

Many attempts have been made to define the term reasonable doubt, but it is doubtful whether they are any clearer than the words themselves. A reasonable doubt may, however, be defined as one arising from a consideration of all the evidence or lack thereof. It is not just any vague, speculative or imaginary doubt which may occur to you, nor a mere excuse that you may conjure up without foundation or out of sympathy for the accused, nor does it mean the bare possibility of innocence. It is an actual, substantial and real doubt. If after an impartial comparison and consideration of all the evidence, or lack thereof, you can truthfully say that you are not satisfied of defendant's guilt, you have a reasonable doubt; but if you can truthfully say that you have an abiding conviction—that is, a strong and persisting belief—of the defendant's guilt, such as you would be willing to act upon, if you were under no compulsion to act, in the more important affairs of your own life, then you have no reasonable doubt.

No. 10

Subject to the law as contained in these instructions, you are also the sole and exclusive judges of the credibility of the witnesses and of the effect and value of the evidence.

You are, however, instructed that your power of

judging the effect of evidence is not arbitrary but is to be exercised by you with legal discretion and in subordination to the rules of evidence; that the oral admissions of a party should be viewed with caution; that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party offering it, such evidence should be viewed with distrust.

Before reaching a verdict you will carefully consider and compare all the testimony. In determining the credibility of witnesses and the weight to be given their testimony, you may take into consideration the interest that any witness may have in the outcome of the case, the motive he may have for testifying falsely with regard to any material matter, the conduct and demeanor [180] of the witness while on the stand; his manner of testifying, his apparent candor, the means and opportunity he had to learn or ascertain the facts to which he testified: the probability or improbability of his testimony; his prejudice or bias against or disposition to favor the Government or the defendant; his inclination to speak truthfully or otherwise, his intelligence or lack thereof; the reasonableness or unreasonableness of his testimony; the extent to which he is corroborated or contradicted on ma-

terial matters; and all the other facts and circumstances in evidence which shed light upon the witness' credibility.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds. The direct evidence of one witness whom you find to be entitled to full credit is sufficient for the proof of any fact in this case. A witness wilfully false in one part of his testimony may be distrusted in other parts. Whenever it is possible you will reconcile conflicting or inconsistent testimony, but where it is not possible to do so, you should give credence to that testimony which, under all the facts and circumstances of the case, appeals to you as the most worthy of belief.

You are also instructed that the opening statements and the arguments of counsel are not evidence, and they are not binding upon you. You may, however, be guided by them if you find that they are supported by the evidence and appeal to your reason and judgment.

In considering your verdict you are instructed that any testimony which has been ordered stricken by the Court should not be considered by you for any purpose.

I also instruct you that the matter of punishment or leniency is not your concern and should not be considered by you for any purpose. Your duty consists wholly in determining the guilt or inno-

cence of the defendant. The matter of punishment and grounds for the exercise of leniency are exclusively for the Court. [181]

No. 11

The law makes the defendant in a criminal action a competent witness. When he becomes a witness and testifies, he is deemed to be a witness for all purposes and his testimony and his credibility are to be determined by applying the same tests to them as in the case of any other witness. Therefore, the use of the word "witness" or "witnesses" in these instructions includes the defendant except where otherwise specified or indicated. In determining his credibility, you have a right to take into consideration the fact that he is the defendant and that his interest in the result of your verdict is great, and give his testimony, considered in connection with all the other evidence, such weight as you believe it entitled to.

No. 12

There is testimony in this case that the defendant has been previously convicted of other crimes. The Court instructs you that such evidence is not to be considered by you as evidence of the defendant's guilt of the crime for which he is now on trial, but is only to be considered by you in determining his credibility as a witness and the weight and value that you may give to his testimony.

No. 13

You are instructed that if you find from the evi-

dence that any witness has been convicted of crime, you may take that fact into consideration in determining his credibility and the weight and value you will give to his testimony.

No. 14

Testimony has been admitted showing, or tending to show, that the defendant fished unlawfully in Red Fish Bay. This evidence was admitted not to prove that the defendant violated the fisheries law, but to be considered by you in determining, in connection with all the other evidence, whether the defendant committed the crime charged in the indictment. [182]

No. 15

The testimony concerning the defendant's previous good general reputation for honesty and integrity in Petersburg, Alaska, has been admitted not for the purpose of showing that the defendant did not commit the crime charged in the indictment but to show the improbability of his having done so. General reputation is not what a few people think but what people generally think. It is for you to say whether the defendant's good general reputation for honesty and integrity in the community of Petersburg has been proved. If you find that it has, you may consider it along with all the other facts and circumstances and give it such weight as you think it entitled to.

No. 16

The law requires that all twelve jurors must agree upon a verdict before one can be rendered.

While no juror should yield a sincere conviction, founded upon the law and the evidence of the case merely to agree with other jurors, every juror, in considering the case with fellow jurors, should lay aside all undue pride or vanity of personal judgment, and should consider differences of opinion, if any arise, in a spirit of fairness and candor, with an honest desire to give at the truth, and with the view of arriving at a just verdict because the law contemplates that the verdict shall be the product of the collective judgment of the entire jury.

Accordingly, no juror should hesitate to change the opinion he has entertained, or expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty. [183]

No. 17

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and you should not single out one particular instruction and consider it by itself or separately from or the exclusion of all the other instructions.

As you have been heretofore instructed, your duty is to determine the facts of the case from the evidence submitted, and to apply to these facts the

law as given to you by the Court in these instructions. The Court does not, either in these instructions or otherwise, wish to indicate how you shall find the facts or what your verdict shall be, or to influence you in the exercise of your right and duty to determine for yourselves the effect of evidence you have heard or the credibility of witnesses, because the responsibility for the determination of the facts in this case rests upon you and upon you alone.

No. 18

Upon retiring to your jury room you will elect one of your number foreman, who will speak for you and sign the verdict unanimously agreed upon.

You will take with you to the jury room these instructions, together with one form of verdict. If you find the defendant guilty, you will draw a line through the blank space before the word "guilty"; but, if you do not so find, you will write the word "not" in such blank space.

When you have agreed upon a verdict and your foreman has dated and signed it, you will return it into court in the presence of the entire jury, together with these instructions.

Given at Juneau, Alaska, this 19th day of April 1949.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 20, 1949. [184]

Defendant's Requested Instruction No. 1

The defendant has been tried before a jury and found not guilty of three charges of illegal fishing at Red Fish Bay, on Baranof Island, Alaska, namely:

Count 1, which charged him with fishing on August 10, 1948, at Red Fish Bay, on Baranof Island, Alaska, for commercial purposes, said area being then and there closed to such fishing;

Count 2, which charged him with fishing on August 15, 1948, at Red Fish Bay, on Baranof Island, Alaska, for commercial purposes, said 15th day of August, 1948, being a Sunday, and said area being then and there closed to such fishing; and

Count 3, which charged him with fishing on August 16, 1948, at Red Fish Bay, on Baranof Island, Alaska, for commercial purposes, said area being then and there closed to such fishing.

You are instructed that the defendant cannot again be tried on charges of illegal fishing in Red Fish Bay, on Baranof Island, Alaska, on August 10th, August 15th or August 16th, 1948. The evidence of illegal fishing by the defendant at Red Fish Bay, on Baranof Island, Alaska, on those dates has been admitted, and may only be considered by the jury, insofar as it may prove, or tend to prove, the charge of bribery for which the defendant is here on trial; and you are further instructed that you are not to find the defendant guilty of the charge of bribery because of evidence showing, or tending to show, that he may have committed other offenses then, or at other times or places. [185]

[Title of Court and Cause.]

MOTION FOR ORDER AND ORDER EXTENDING TIME FOR FILING TRANSCRIPT OF RECORD AND DOCKETING CAUSE IN APPELLATE COURT

Comes now the above named defendant and moves the court for an order extending the time for filing the transcript of record and docketing the within cause in the appellate court for the period of ninety days from May 12, 1949, on which day notice of appeal was filed herein, for the reason that the court reporter is unable to prepare a transcript of the evidence within the forty days provided by law for filing the transcript of record and docketing the cause on appeal.

This motion is based upon the record and files herein, and upon the statements of the said court reporter available in support of this motion.

Dated: Juneau, Alaska, June 8, 1949.

HOWARD D. STABLER,
Defendant's Attorney.

ORDER

On reading and filing the above motion it is Ordered: that the time for filing the transcript of record and docketing the within cause on appeal in the appellate court be, and it is hereby, extended for the period of ninety days from May 12, 1949.

Done in open court at Juneau, Alaska, the 10th day of June, 1949.

GEORGE W. FOLTA,
District Judge.

Copy delivered to U. S. Atty.'s office June 8, 1949 HDS.

Copy delivered to U. S. Atty's office June 8, day of June, 1949.

P. J. GILMORE, JR.,
U. S. Attorney.

Filed in Dist. Court, Terr. of AAA. June 8, 10:10 a.m., 1949. First Division at Juneau.

J. W. LEIVERS,
Clerk,

By LOIS P. ESTEPP,
Deputy.

[Endorsed]: Filed June 8, 1949. [186]

In the District Court for the Territory of Alaska,
Division Number One. At Juneau.

No. 2505-B

UNITED STATES OF AMERICA,

vs.

KURT GUSTAF NORDGREN.

SUPPLEMENTAL PRAECIPE

To the Clerk of the above entitled court at Juneau,
Alaska.

Please prepare and transmit to the United States Court of Appeals for the Ninth Circuit, to be filed and docketed in said appellate court, within the time provided by law, for use on appeal in the above entitled action, the following additions to the transcript of record on appeal:

9. Court's Instructions to the jury, and Defendant's Requested Instruction No. 1.

10. Motion and order extending time for filing transcript of record and docketing cause in appellate court entered June 10, 1949.

Dated: Juneau, Alaska, June 13, 1949.

HOWARD S. STABLER,
Attorney for Appellant.

Copy hereof received June 15, 1949.

STANLEY D. BASKIN,
U. S. Attorney.

Certified to be the original Supplemental Prae-
cipe.

J. W. LEIVERS,
Clerk.

[Seal] By /s/ P. D. E. McIVER,
Deputy.

[Endorsed]: Filed June 15, 1949. [187]

[Title of District Court and Cause.]

CERTIFICATE

I, James W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 187 pages of typewritten matter, numbered from 1 to 187, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record prepared in accordance with the praecipe of the Appellant on file herein and made a part hereof, in Cause No. 2505-B, wherein Kurt Gustaf Nordgren is Defendant-Appellant and the United States of America is Plaintiff-Appellee, as the same appears of record and on file in my office; that said record is by virtue of a Notice of Appeal in this cause and the return thereof in accordance therewith.

And I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to (\$10.40) Ten Dollars and Forty Cents has been paid to me by counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 8th day of July, 1949.

JAMES W. LEIVERS,

Clerk of the District Court.

[Seal] By /s/ P. D. E. McIVER,

Deputy.

[Endorsed]: No. 12294. United States Court of Appeals for the Ninth Circuit. Kurt Gustaf Nordgren, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed July 18, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 12294

KURT GUSTAF NORDGREN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATING ENTIRE RECORD TO BE
PRINTED AND STATEMENT OF POINTS

Comes now the above named appellant Kurt Gustaf Nordgren and respectfully designates the entire record on appeal to be printed for consideration on appeal; and submits the following Statement of Points on which he intends to rely on his appeal:

1. The evidence submitted on the part of the prosecution showed that William McKenzie accepted a bribe from the defendant, and was therefore an accomplice in the commission of the offense charged, and there was no corroboration of the accomplice testimony as required by section 66-13-59 Alaska Compiled Laws Annotated 1949; and the court failed to instruct the jury that the testimony of an accomplice ought to be viewed with distrust, as required by subdivision fourth of section 58-5-1 ACLA 1949.

2. The prosecution failed to show or prove the offense of bribery charged in the indictment, or any offense, because the evidence submitted failed to show that William McKenzie, the alleged bribe

taker, was an officer of the United States, or a person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government, as charged in the indictment, within the meaning of section 91, Title 18, United States Code.

3. Instruction No. 6 given by the court was erroneous in this: The Court charged that William McKenzie was, at the time charged in the indictment,

“a person acting for and on behalf of the United States in the function of conserving and protecting the commercial salmon fisheries of Alaska, under and by authority of the Department of the Interior”

whereas section 91, Title 18, U. S. Code, defining the offense charged, requires that said function to be an “official function”.

4. Instruction No. 7 given by the court was erroneous in this: The Court charged that,

“If you find from the evidence beyond a reasonable doubt that the defendant on or about August 12, 1948, offered or gave \$200.00 to William McKenzie, then and there a person acting for and on behalf of the United States, under and by authority of the Department of the Interior, in apprehending or arresting or causing the apprehension, arrest or conviction of persons fishing commercially for salmon in the closed waters of Red Fish Bay, knowing that he was such a person . . . you should convict him”

in that it directs a conviction if the defendant William McKenzie was "a person acting for or on behalf of the United States, under and by authority of the Department of the Interior", and performing the duties stated, whereas section 91, Title 18, U. S. Code, defining the alleged offense charged in the indictment would require the said William McKenzie to be acting for and on behalf of the United States in an "official function", under and by authority of the Department of the Interior.

5. The court erred in denying the defendant's motion for acquittal at the conclusion of the Government's evidence, and at the conclusion of all the evidence.

6. The court erred in refusing to give the defendant's requested Instruction No. 1.

7. The Government's evidence failed to show that said William McKenzie had the duty or authority to apprehend or arrest or cause the apprehension or arrest or conviction of persons fishing commercially for salmon in the closed waters of Red Fish Bay for the reason that the prosecution failed to show that said William McKenzie was an officer or employee of the Fish and Wild Life Service of the Department of the Interior "designated by the Director" of the Fish and Wild Life Service of the Department of the Interior so as to be a peace officer as required by section 227, Title 48, U. S. Code; or authorized by the Secretary of the Interior to enforce the fisheries laws and regulations as prescribed by section 192, Title 48, U. S. Code, or was

a law enforcement officer as prescribed by section 248a, Title 48, U. S. Code.

8. The verdict is contrary to the weight of the evidence.

9. The verdict is not supported by substantial evidence.

10. The court erred in denying the defendant's motion and supplemental motion for new trial.

11. Other manifest error appearing of record to which objection was taken and exception reserved.

Dated: July 12, 1949.

/s/ HOWARD D. STABLER,
Appellant's Attorney.

Copy hereof received July 12, 1949.

/s/ STANLEY D. BASKIN,
Assistant U. S. Attorney.

[Endorsed]: Filed July 18, 1949.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KURT GUSTAF NORDGREN,
Appellant,
VS.
UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

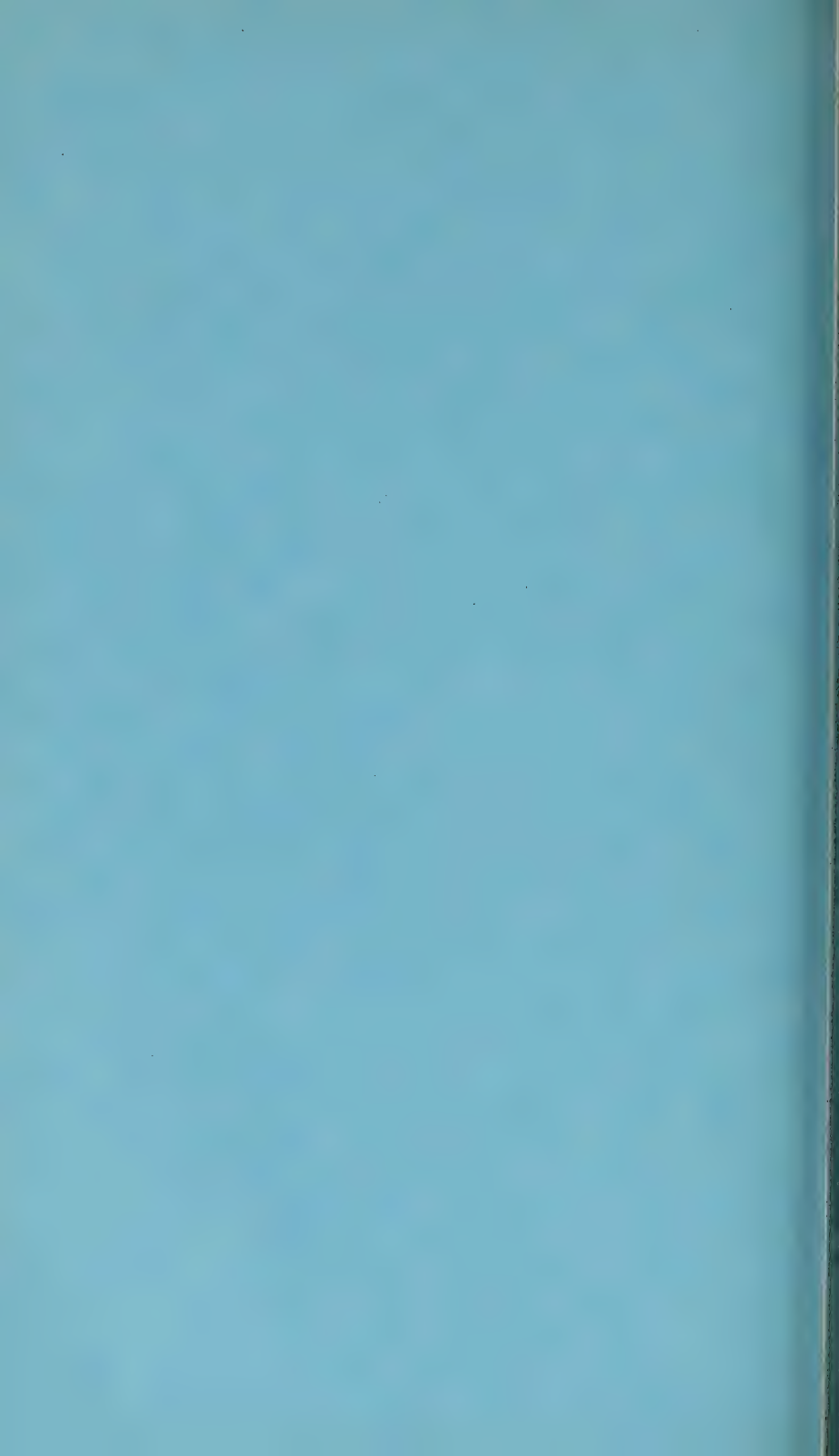
*On Appeal from the District Court for the
Territory of Alaska, Division Number One.*

P. J. GILMORE, JR.,
United States Attorney,
and
STANLEY D. BASKIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

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PAUL P. O'BRIEN,



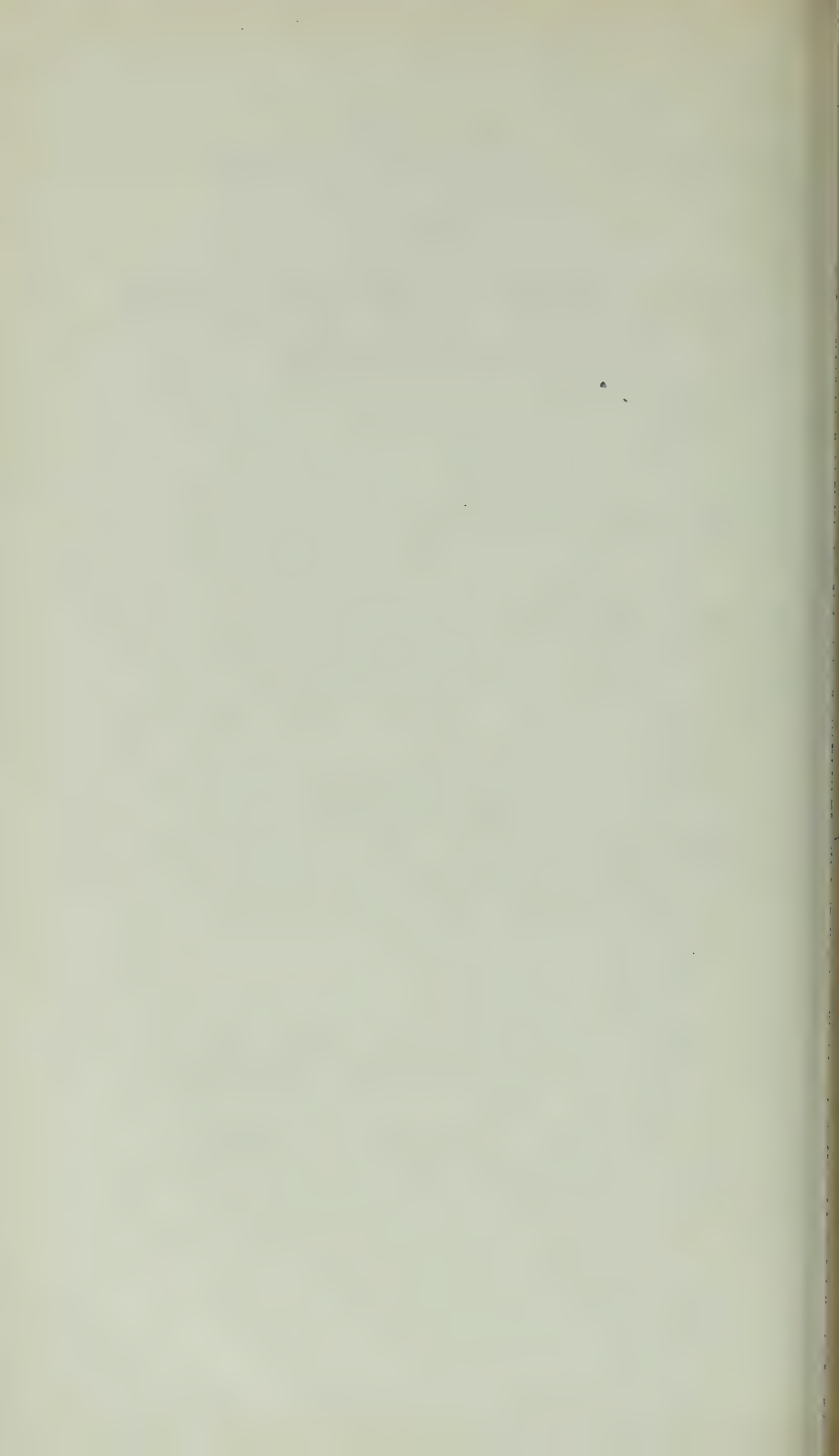
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IN THE
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| KURT GUSTAF NORDGREN, | } |
| <i>Appellant,</i> | |
| vs. | |
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| <i>Appellee.</i> | } |

APPELLEE'S BRIEF

PRELIMINARY STATEMENT

Appellant, who was the defendant below, brings this appeal from his conviction of the crime of bribery in violation of Title 18, U.S.C.A. Sec. 91, 1946 Ed. upon a verdict of a jury after a trial in the District Court of Alaska, First Division, at Juneau. The Honorable George W. Folta, presiding, sentenced appellant to imprisonment in a United States Penitentiary for a period of fourteen months and to pay a fine of \$200.00

STATEMENT OF FACTS

Appellant, Kurt Gustaf Nordgren, a commercial fisherman, was owner and operator of the fishing ves-

sel LOIS W and on or about August 9, 1948, accompanied by two crewmen, Hugh Harris and Richard Harris, went into Red Fish Bay, Baranof Island, Alaska, and anchored at the north end of the Bay near the mouth of a stream. This bay is situated on the extreme south end of Baranof Island and is very narrow near the entrance which aptly bears the names of First and Second Narrows. The entire bay north of the Second Narrows was closed to commercial fishing at all times pertinent to this case.

William McKenzie, age 63, was employed from June 18, 1948 to August 22, 1948 by the Fish and Wildlife Service, Department of the Interior, United States of America, as a Fishery Patrol Agent, and with the duty of observing the area of Red Fish Bay closed to commercial fishing to prevent the taking of fish in the area, to report to the Fish and Wildlife Service any persons fishing in the area, and arrest or cause the arrest of any persons taking fish illegally in the area. McKenzie maintained a camp about 100 feet from the shore near the stream flowing into the north end of Red Fish Bay from June 23 to August 21, 1948, and remained in the area as the only Agent of the Fish and Wildlife Service continuously during the period. No other Fish and Wildlife officers or agents were in the area between August 9 and August 21, 1948.

Shortly after Appellant anchored his boat in Red Fish Bay on August 9, 1948, he engaged McKenzie in conversation briefly, about the fish in the Bay, then

left Red Fish Bay. Appellant and his crew returned on the LOIS W about 5:00 P.M. Appellant, alone, went to McKenzie's tent, where he again engaged the latter in conversation, saying "There is no reason why you cannot make \$450 to \$500 for yourself here," and that he would give McKenzie a share of the fish he caught. McKenzie at the time told Nordgren he was a Fishery Patrol Agent of the Fish and Wildlife Service.

On or about August 12, 1948, Appellant, together with his two crewmen, returned to Red Fish Bay on the LOIS W where Appellant, again alone, contacted McKenzie at the latter's tent and gave McKenzie two \$100 bills, saying he was giving McKenzie one-sixth of the value of fish he had caught, having sold \$1200 worth of fish, and that he would send McKenzie a post office money order for his part of other fish caught, after Appellant made his last trip. At the same time he asked for and received McKenzie's Juneau, Alaska Post Office address. McKenzie explained that he accepted the money only because he knew Appellant wanted to get the fish which were in the area of Red Fish Bay, closed to commercial fishing—that he was afraid he would be harmed by Appellant and his crew if he did not cooperate with them. He took the money and tried to get along until he could get away from the bay.

McKenzie observed Appellant and his crewmen fishing for and catching fish by means of the vessel

LOIS W and seine in the closed area of Red Fish Bay about August 15 and 16, 1948. On the latter date, Appellant told McKenzie he "shouldn't sit on the beach while we are making a haul, that way. Go back up in the woods. Someone might come and see you sitting there, and it might be a good idea for you to put the fire out when you go back in the woods."

On August 21, 1948, Milton Frank Harndin, Captain of the Fish and Wildlife Service Vessel SCOTER, together with his crewmen, picked William McKenzie up and took him to Sitka, Alaska. Immediately after going aboard the SCOTER, McKenzie reported the bribery and illegal fishing on the part of Appellant to Captain Harndin and showed him the two \$100 bills, and also reported the matter to Gomer S. Hilsinger, Fish and Wildlife Agent in Sitka, Alaska, immediately upon his arrival, August 22, 1948. The money was produced and identified as evidence in the trial of the case.

It was on the basis of this and other evidence that Appellant was found guilty of bribery in violation of Title 18, U.S.C.A. Sec. 91, 1946 Edition.

ISSUES

I

THE EVIDENCE SUBMITTED SUFFICIENTLY PROVED WILLIAM McKENZIE, RECEIVER

OF THE BRIBE, WAS A PERSON ACTING FOR AND ON BEHALF OF THE UNITED STATES IN AN OFFICIAL FUNCTION, AND THUS NO ERROR WAS COMMITTED BY THE COURT IN REFUSING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL; AND MOTION FOR A NEW TRIAL.

The evidence submitted as proof that Government witness William McKenzie was a person acting for and on behalf of the United States in an official function may be summarized as follows:

McKenzie, a resident of Juneau, Alaska, was employed during June 18 to August 22, 1948, by the Fish and Wildlife Service, United States Department of Interior, as a Fishery Patrol Agent, which position was formerly known as Stream Watchman (T.R. 13, 20, 39-41). He was hired by Dan Ralston, head Law Enforcement Officer of the Fish and Wildlife Service (T.R. 39-40), and took the oath of office before Miss O'Neil of the same service (T.R. 39-40). McKenzie's salary as a Fishery Patrol Agent was paid by the Fish and Wildlife Service and by means of a Government check (T.R. 35). He was taken to Red Fish Bay, Baranof Island, Alaska on June 22, 1948 by the Fish and Wildlife Service (T.R. 23), and was also picked up by the Fish and Wildlife Service at the termination of his work (T.R. 35-37). A 12 foot boat owned by the Fish and Wildlife Service was left with McKenzie for his use (T.R. 20).

McKenzie's duties as Fishery Patrol Agent were to observe the area of Red Fish Bay, Baranof Island, Alaska, closed to commercial fishing, by the laws of the United States and Regulation promulgated by the Fish and Wildlife Service, from the 2nd narrows in the entrance of the bay to the north end or head of the bay; to see that no one fished in the closed area (T.R. 14, 20, 25, 35, 40); and to report to the Fish and Wildlife Service any persons who fished in the closed area. (TR. 14). There wasn't much said about arresting anybody (T.R. 153). McKenzie, after performing the services described, reported to Captain Milton Frank Harndin, Master of the Fish and Wildlife Vessel SCOTER and Agent Gomer S. Hilsinger the facts relating to Appellant being in and fishing in the closed area of Red Fish Bay, Baranof Island, Alaska August 9 to 16, 1948, and receipt of the \$200.00 from Appellant, together with the circumstances surrounding the same. (T.R. 36-37, 59-60).

Gomer S. Hilsinger, Fish and Wildlife Service Agent, stationed at Sitka, Alaska, testified that William McKenzie was an employee of the Fish and Wildlife Service on August 22, 1948 when McKenzie turned over to him two \$100 bills advising him, Hilsinger, they were received from Appellant. (T.R. 61, 37, 38).

Appellant, admitting McKenzie was an employee of the Fish and Wildlife Service, contends that because the evidence did not show that McKenzie was appointed

by the Director of the Fish and Wildlife Service, he could not have been performing an official function of the United States under the Bribery Statute Title 18 U.S.C.A. Sec. 91. (Appellant's Brief pg. 9). He relies entirely on the provisions of Title 48 U.S.C.A. Sec. 227 which in substance states all employees of the Fish and Wildlife Service designated by the Director shall be considered peace officers and shall have the same powers of arrest of persons and seizure of property for violating provisions of the Alaska Fisheries Law as have United States Marshals or their Deputies.

Simply because this Statute (48 U.S.C.A. 227) confers upon certain employees designated by the Director of the Fish and Wildlife Service the power of arrest and seizure of property, it does not follow that all employees, including Fishery Patrol Agents, must be vested with such power and be appointed by the Director in the manner set out in the Statute, in order to be "persons acting for and on behalf of the United States in an Official Function," within the meaning of the Bribery Statute Title 18 U.S.C.A. Sec. 91, and within the authority conferred upon the Department of Interior in the supervision and control of the Alaska Fisheries under Title 48 U.S.C.A. Secs. 220 to 248b. The activities of William McKenzie in observing the area of Red Fish Bay closed to commercial fishing from June 23, to August 22, 1948, observing Appellant catching fish in the closed area, and reporting the facts to the Fish and Wildlife Service causing Appellant's arrest and prosecution, investigation of violations of the crim-

inal provisions of the Alaska Fisheries Laws, and preventing other persons from fishing illegally in the closed area, constituted official actions, duties and functions of the Department of Interior in enforcing the laws and regulations as well as the protection and conservation of the Alaska Fisheries for the benefit of all peoples in Alaska and United States. Indeed these are the very functions of the Fish and Wildlife Service.

The powers and functions of the Department of Interior, duties and responsibilities of employees in the supervision and control of the Alaska Fisheries are derived from all the statutes pertaining to the Alaska Fisheries, the regulations promulgated by the departments or agencies governing the same, any and all other applicable federal statutes and regulations, as well as the customs and usages established in the department.

In *United States v. Birdsall, et al.*, 233 U.S. 223, a bribery case in which the sufficiency of the indictment was the issue, the Court speaking of official duties and functions stated:

“Every action that is within the range of official duty comes within the purview of these sections. There was thus a legislative basis (*United States v. George*, 228 U.S. 14, 22) for the charge in the present case, if the action sought to be influenced was official action. To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it

was governed by a lawful requirement of the department under whose authority the officer was acting. Rev. Stat., §161; *Benson v. Henkel*, 198 U.S. 1, 12; *Haas v. Henkel*, 216 U.S. 462, 480. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities. *United States v. MacDaniel*, 7 Pet. 1, 14. (32 U.S. 1, 14). In numerous instances, duties not completely defined by written rules are clearly established by settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned statutes against bribery.”

United States v. MacDaniel, 32 U.S. 1, 14.

United States v. Ingham et al (D.C. E.D. Penn). 97 F 935.

Other statutes which confer authority upon the Fish and Wildlife Service in the performance of its functions in the conservation of Alaska Fisheries are:

Title 48 U.S.C.A. Sec. 241 which reads as follows:

“To enforce the provisions of sections 230 to 242 of this title and such regulations as he may establish in pursuance thereof, the Secretary of Interior is authorized and directed to depute, in addition to the agent and assistant agent of salmon fisheries otherwise provided by law, from the officers and employees of the Department of Interior, a force adequate to the performance of

all work required for the proper investigation, inspection, and regulations of the Alaskan Fisheries and Hatcheries, and he shall annually submit to Congress estimates to cover the cost of the establishment and maintenance of fish hatcheries in Alaska, the salaries and actual traveling expenses of such officials, and for such other expenditures as may be necessary to carry out the provisions of said sections."

This has particular reference, as applied to instant case, to the provisions contained in Section 232 of Title 48, and Section 234 of Title 48 concerning the closed season for salmon as provided in the first sentence of the latter section, and regulations made pursuant thereto, providing in effect that it is unlawful to fish for, take, or kill any salmon * * * * * "or during such further closed time as may be declared by authority conferred by law." * * * *

It was stipulated (T.R. 15, 16) that the area of Red Fish Bay, Baranof Island, Alaska, north of the second narrows, was closed to commercial fishing.

The Department of Interior, acting by and through the Fish and Wildlife Service, Reorganization Plan No. II, Sec. 4 (e) (53 Stat. at L. 1433) 76th Congress, 1st Session — Plan No. II — May 9, 1939. 48 U.S.C.A. 220. Title 3, Chap. IV. Reorganization Plan II, Book 1 C.F.R. 256, 1939 Supplement. Joint Resolution of June 7, 1939 (Public Res. No. 20) 76th

Congress, 1st Ses. Chap. 193. Reorganization Plan No. III, Effective June 30, 1940 (54 Stat. 1232), was authorized to prescribe regulations for the government of the department, distribution and performance of its business, 5 U.S.C.A. 22; delegate to subordinates power vested in the Department to take final action in matters pertaining to the employment, direction and general administration of personnel, 5 U.S.C.A. 22a. The head of the Department, or independent establishment may delegate to subordinates, under such regulations as he may prescribe, the power to employ such persons in the field service of his department or establishment, 5 U.S.C.A. 43.

Pursuant to authority granted in the last cited statute ample provisions were made for the employment of William McKenzie, as Fishery Patrol Agent, formerly known as Stream Watchman, by the Secretary of Commerce while the Bureau of Fisheries was under that department. This authority, duty and function was later transferred to the Department of Interior and Fish and Wildlife Service. Reorganization Plans No. II and No. III, supra. The regulations are as follows:

Section 1.16 of Title 15 C.F.R. (Vol. 4, p. 410-411) provides SUBORDINATES DELEGATED TO EMPLOY CERTAIN FIELD PERSONNEL. Pursuant to the authority contained in the Act approved June 26, 1930 (46 Stat. 817; 5 U.S.C. 43), the power to employ personnel of the class indicated for duty in the field

service of the bureau specified is hereby delegated to the employees designated below:

(a) * * * * *

(b) Bureau of Fisheries. Employees authorized to employ: Commissioner; agent-caretakers, Pribilof Islands; masters of vessels; directors of biological stations; AGENTS AND ASSISTANT AGENTS, ALASKAN FISHERIES SERVICE; FIELD SUPERINTENDENT; DISTRICT SUPERVISORS; car captains; superintendents of fish cultural stations; heads of field parties.

Personnel authorized to be employed: Crews of vessels (below grade of engineer); LABORERS, MECHANICS, ASSISTANTS, GUIDES, AND STREAM WATCHMEN IN THE ALASKAN SERVICE; PERSONNEL EMPLOYED TEMPORARILY UNDER SCHEDULE A, SUBDIVISION XI, PARAGRAPH I OF CIVIL SERVICE RULES.

The Civil Service rules referred to are Title 5 C.F.R. Sec. 50.0 and 50.10 (Vol 1, p. 48 and 57 of C. F.R.) AND EXEMPT PERSONS TEMPORARILY CONNECTED WITH THE FIELD OPERATIONS OF THE BUREAU OF FISHERIES FROM EXAMINATION BY THE CIVIL SERVICE. (Emphasis added)

The Bureau of Fisheries with all its functions was transferred from the Department of Commerce to the Department of Interior effective July 1, 1939, by Reorganization Plan No. II. Sec. 4(e) (53 Stat. at

L. 1433) 76th Congress, 1st Session—Plan No. II—May 9, 1939. 48 U.S.C.A. 220. Title 3, Chap. IV, Reorganization Plan II, Book 1 C.F.R. 256, 1939 Supplement . Joint Resolution of June 7, 1939 (Public Res. No. 20) 76th Congress, 1st Ses. Chap. 193. Then by Reorganization Plan No. III, effective June 30, 1940 (54 Stat. 1232) the Bureau of Fisheries and the Bureau of Biological Survey of the Department of the Interior with their respective functions were consolidated into one agency in the Department of Interior known as the Fish and Wildlife Service.

The regulations published in the Federal Register and Code of Federal Regulations which have been recited herein are judicially noticed. 44 U.S.C.A. 307 and 311c, and the Court is respectfully requested to judicially notice the Regulations.

Sears v. United States (C.C.A.-1) 264 F 257

Thus we submit that William MacKenzie, employed as a Fishery Patrol Agent, in the investigation of violation of the Laws and Regulations of the Alaska Fisheries; prevention of illegal fishing in an area closed to commercial fishing; observing Appellant catching fish illegally; reporting the facts of Appellant's illegal fishing as well as the bribery to officials of the Fish and Wildlife Service, was a person acting for and on behalf of the United States in an Official Function, under and by authority of the Fish and Wildlife Service. Sec. 1.16 of Title 15 C.F.R. He was certainly

a Stream Watchman in the Alaska Service, or a person "employed temporarily under Schedule A, Subdivision XI, Parg. 1, of Civil Service Rules." 5 C.F.R. Sec. 50.0 and 50.10. The testimony of William McKenzie was sufficient to show that he was appointed by the Law Enforcement Officer or Agent of the Fish and Wildlife Service, which would be within the classes of employees, "agents and assistant agents, Alaskan Fisheries Service; Field Superintendent; District Supervisor" authorized to employ under Sec. 1.16, Title 15, C.F.R.

The case of *United States v. Remington* (C.C.A.-2) 64 F 2d 386 is in point. Appellant, a federal prohibition agent, was prosecuted for accepting a bribe to "lay off" prosecution of one Bastian. It was urged that the Appellant was not proved to be "an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or officer of the Government." The Appellant, the Government employee, himself testified that he was a federal prohibition agent. So did several of the Government witnesses, and the Court held the proof was sufficient.

Other cases in point are *Sears v. United States* (C.C.A.-1) 264 F 257; *Daniels et al. v. United States* 17 F. 2d 339, Cer. Den. 274 U.S. 744; *United States v. Ingham et al.* (D.C. E.D. Penn.) 97 F 935.

Appellant relies upon *Krichman v. United States* 256 U.S. 363, *Heaton v. United States* (C.C.A.-2) 280

F 697, and *Kellerman v. United States* (C.C.A.-3) 295 F 796. It is respectfully submitted that none of these cases are analogous to the case at bar. They are easily distinguishable, and do not support his contention.

In *Krichman v. United States, supra*, the person bribed was a baggage porter employed by the Pennsylvania Railroad while the railroads were under the control of the Federal Government during World War I. The Court apparently relying upon *United States v. Strang et al.* 254 U.S. 491, held in effect that the Pennsylvania Railroad was a separate entity from the Government. In instant case witness McKenzie was employed by the Fish and Wildlife Service, an establishment of the Department of Interior charged with the primary responsibility of conserving Alaska Fisheries.

Heaton v. United States, supra, was decided upon a defect in the indictment and is thus distinguishable. However the Courts of Appeals for the 6th Circuit and 8th Circuit have refused to follow the Heaton case. *Crimmian v. United States* (C.C.A.-6) 1 F 2d 643, 644; *Biddle v. Wilmot* (C.C.A.-8) 14 F 2d 505; *Droppps v. United States* (C.C.A.-8) 34 F 2d 15. It was expressly overruled by the 2nd Circuit in *United States v. Remington* (C.C.A.-2) 64 F 2d 386 which said that in view of these cases the Heaton case could no longer be considered the law. If by chance the Court should regard the Heaton case in conflict with instant case it is respectfully requested that the Court overrule it.

Kellerman v. United States (C.C.A-3) 295 F 796 was likewise decided upon the insufficiency of the indictment. In that case, and unlike instant case, the indictment charged bribing a "United States Customs Keeper" without alleging the person receiving the bribe was an officer of the United States, or a person acting for or on behalf of the United States in an Official Function. The Court held that the indictment did not disclose whether Sterner (receiver of the bribe) came within or without the particular class of Government employees which Title 18 U.S.C.A. Sec. 91 (1946 Ed.) contemplated.

II

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN INSTRUCTING THE JURY THAT WILLIAM McKENZIE WAS ACTING IN THE FUNCTION OF CONSERVING COMMERCIAL FISHERIES.

The evidence relating to McKenzie's employment and duties as a Fishery Patrol Agent of the Fish and Wildlife Service is set out under ISSUE NO. 1 of this brief, and reference is made to that section for the details. These facts are not disputed or controverted in any manner. They clearly show that McKenzie was employed to investigate violations of the Fishery laws and regulations, prevent fishing in the waters of Red Fish Bay which were closed to commercial fishing, and report to the Fish and Wildlife Service any person who

did catch fish in the area, and that he did so report that appellant caught fish in the closed waters. Such was a duty and function of the Department of Interior, acting by and through the Fish and Wildlife Service and its employees. 48 U.S.C.A. 220 to 248b, Reorganization Plans No. II and No. III, *supra*. This issue being uncontroverted, the Court did not assume any fact not proven by the evidence, nor misrepresent the law, but stated a relationship which actually existed. *United States v. Birdsall, et al.*, 233 U.S. 223.

It is said in 16 C.J. 950 Sec. 2329 "as a general rule, an instruction is not erroneous, as invading the province of the jury, because it assumes the existence of facts which are established clearly by uncontradicted evidence."

Wiborg v. United States 163 U.S. 632, 656.

The instructions given by the Court must be considered together and as a whole. *Walsh v. United States* (C.C.A.-7) 174 F 615, Cer. Den. 215 U.S. 609. *Horn et al. v. United States* (C.C.A.-8) 182 F 721, 739-740, Cer. Den. 219 U.S. 585. Excerpts or particular parts cannot be separated and considered apart from the whole instruction. *Martin et al. v. United States* (C.C.A.-10) 100 F 2d 490, 497, Cer. Den. 306 U.S. 649; *Hargreaves v. United States* (C.C.A.-9) 75 F 2d 68, 73, Cer. Den. 295 U.S. 759). The Jury was so instructed in No. 17 (T.R. 167-168). They were advised that they were the triers and exclusive judges of the facts in the case. The Court clearly left the ulti-

mate determination of the facts to the Jury as will be observed in the fourth paragraph of Instruction No. 1, Instruction No. 7 and Instruction No. 17 (T.R. 158, 161, 167-168).

In Federal Courts considerable latitude is allowed trial judges in instructing juries. They are governors of the trial for the purpose of assuring its proper conduct and of determining questions of law. In their discretion they may comment and express their opinion upon the evidence provided the jury is told that the determination of the facts rests entirely with them. *MacKnight v. United States* (C.C.A.-1) 263 F 832, 838, Cer. Den. 253 U.S. 493; *Tuckerman et al. v. United States* 291 F 958, 965 (a bribery case). The Court may further state that certain propositions are established by the evidence, such as McKenzie performing a function of the Department of Interior in conservation of the fisheries. *Zottarelli et al. v. United States* (C.C.A.-6) 20 F 2d 795, 799, Cer. Den. 275 U.S. 571.

In this case, whether McKenzie was performing a duty and function imposed upon the Department of Interior, by laws of the United States and regulations made pursuant thereto for conserving fisheries in Alaska, was a question of law for the Court and it properly instructed the jury on this issue.

Gratiot v. United States 45 U.S. 80, 117.

III

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING APPELLANT'S MOTION FOR ACQUITTAL.

Appellee respectfully submits that the points of law and facts argued under Issues I and II of this brief support the Trial Court's denial of appellant's motion for acquittal at the conclusion of the Government's evidence, as well as the conclusion of all the evidence.

IV

THE TRIAL COURT DID NOT COMMIT ERROR BY NOT INSTRUCTING THE JURY GOVERNMENT WITNESS WILLIAM McKENZIE WAS AN ACCOMPLICE AND TO VIEW HIS TESTIMONY WITH DISTRUST.

The facts and circumstances relative to the bribery are summarized as follows:

McKenzie was employed as a Fishery Patrol Agent for the Fish and Wildlife Service and maintained a camp near the headwaters of Red Fish Bay, Baranof Island, Alaska. On August 9, 1948 appellant approached McKenzie and told him he could make Four Hundred and Fifty or Five Hundred Dollars for himself, to which McKenzie said "O.K." McKenzie advised appellant he was a Fishery Patrol Agent formerly known as Stream Watchman. Then on August

12, 1948 appellant, alone, approached McKenzie, showed him a fish slip and said "We are giving you one-sixth" and handed McKenzie two One Hundred Dollar bills; appellant asked for and received McKenzie's Post Office address and said he would send him the rest of the money after the last trip. (Tr. 18-30). The money was identified and introduced as evidence (T.R. 26-30).

McKenzie was 63 years of age (T.R. 39). On August 9, 1948 he refused to go aboard appellant's boat for coffee, explaining that he thought appellant wanted the fish in Red Fish Bay and that he did not want to have any conversation with him. (T.R.. 19-21). As appellant approached McKenzie's tent on August 12, 1948 the latter stated he did not feel very easy when he saw appellant coming; that he made up his mind he would agree to any proposition appellant had to offer until he, McKenzie, got away from there, that he was afraid appellant and his two crewmen Hugh and Richard Harris, would put a rock around his neck and sink him into the bay; that he took the money from appellant and tried to get along until he could get away from Red Fish Bay (T.R. 20, 21, 43-45, 53, 56) and that appellant and his two crewmen were three "great big husky guys and they wanted them fish". (T.R.. 43)

McKenzie further testified that he was the only Fishery Patrol Agent at Red Fish Bay (T.R. 23, 42, 57); that he had only an outboard 12 foot boat, which

was not good for rowing, a 2½ horsepower motor which he could not start (T.R. 20-21, 25); that he had no means of communication and no means of travel other than the outboard boat (T.R. 24); that he was visited by the crew of a Fish and Wildlife Service Vessel only two weeks before August 9, 1948 and again August 21, 1948 (T.R. 23-24, 35, 52); that he left Red Fish Bay August 21, 1948 aboard the Fish and Wildlife Service Vessel SCOTER and reported the bribery to Captain Milton Frank Harndin soon after going aboard (T.R. 37, 52); and also reported the matter to Gomer S. Hilsinger, Agent for the Fish and Wildlife Service at Sitka, Alaska upon his arrival August 22, 1948 (T.R. 37-39); which was the first opportunity he had to report the bribery to officials of the Fish and Wildlife Service, or any other law enforcement agents. (T.R. 66-67).

When McKenzie's acceptance of the \$200.00 Dollars from appellant on August 12, 1948 is viewed in the light of all the attending circumstances and his testimony, which the jury apparently believed, it is respectfully submitted that he was not an accomplice of appellant, and an instruction on the subject was not warranted.

People v. Bennett, (Sup. Ct. Appellate Div. N. Y.) 170 N.Y.S. 718 held that where the prosecuting witness prosecuted the affair with the knowledge, countenance, and approval of the Court, the District Attorney, and the Attorneys in the action, he was not

an accomplice. He "did not lure" defendant to the "commission of crime", but only offered him an opportunity.

In *Ritzman v. United States* (U.S.C.A.-D.C.) 3 F 2d 718, Ritzman, an army officer solicited a bribe from one Standley. The latter advised Attorneys of the Department of Justice who furnished marked bills for payment of the bribe. The Court ruled that Standley was not an accomplice.

In *Finley v. State* (Cr. Crt. of App. Okla.) 181 P 2d 849, where the witness, after being solicited for a bribe, paid it under direction of officers of the law, she was held not to be an accomplice. The Court said "the true test of whether Ruth Fugatt was an accomplice is whether she could be charged and punished for the crime with which the defendant is charged, or whether her participation in the offense was criminally corrupt."

Our position in this case is that there is no evidence that McKenzie was criminally corrupt, and the evidence reveals his participation in the actual commission of the crime was without criminal intent. Thus he cannot be regarded as an accomplice.

Appellant relies on *People v. Coffey* 119 P 901. It is pointed out that this case is no longer authority on this point in California. *People v. Martin*, (Dist. Crt. of Appeals) 300 P. 130, and *People v. Anderson* 242 P. 906, 909 held that the receiver of a bribe was not an accom-

plice of the giver so as to require corroboration of the former.

This point was not raised during the trial, and no requests were made for an appropriate instruction. Rule 30 of the Federal Rules of Criminal Procedure provide in part: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection."

Though the Court may notice plain and serious prejudicial error, even though not assigned as error, "rarely, however, will a trial Court's judgment be reversed for failure to give instructions in the absence of a seasonable request or exception, . . . and then only if the failure to instruct constitutes a basic and highly prejudicial error."

Cave v. United States, (C.C.A.-8) 159 F 2d 464, 469, Cer. Den. 331 U.S. 847, Reh. Den. 332 U.S. 786;

Kempe v. United States (C.C.A.-8) 160 F 2d 406, 411, Cer. Den. 331 U.S. 843;

United States v. Bushwick Mills, Inc., et al. (C.C.A.-2) 165 F 2d 198, 201-202;

Claunch v. United States (C.C.A.-5) 155 F 2d 261, 263.

In answer to impeaching questions appellant stated he was convicted in the United States

Commissioner's Court at Sitka, Alaska for illegal fishing July 27, 1944, and August 26, 1947, the latter occasion for fishing in the waters of Red Fish Bay, Alaska, the scene of the crime in instant case. (T.R. 139). Two of his witnesses, namely, Hugh Harris and Richard Harris were convicted with appellant for similar offenses on August 26, 1947 (T.R. 94-95) and July 27, 1944 (T.R. 111) respectively.

Appellant's defense and theory of case was that he was not in Red Fish Bay, Alaska on August 12, 1948 and that he did not give the \$200.00 to McKenzie (Testimony of Kurt Gustaf Nordgren T.R. 118-139, 134, 128-130; Testimony of Hugh Harris 75-76, 79, 81, 82-84; Testimony of Richard Harris, 101, 105-106). The jury decided against him (T.R. 4). Now appellant predicates his appeal upon the fact that the government witness McKenzie accepted the money from him and was therefore an accomplice.

Such contention is untenable on appeal. Even the case *Smith et al. v. United States* (C.C.A.-9) 173 F 2d 181, cited by appellant as authority for the Court to consider this error, though it was not raised during the trial, in affirming the lower court, stated "It is without question true that in a criminal case the ultimate issue is the guilt or innocence of the accused, to be determined by a fair trial and not the competence of counsel, *but it cannot serve the purpose of justice to permit a defendant to prosecute one theory in the trial court and, finding it unsuccessful, not only to*

substitute another on appeal but to claim error arising out of that which he himself has invited." (emphasis added)

Claunch v. United States (C.C.A-5) 155 F
2d 261, 263.

If appellant did not give the money to McKenzie, the latter could not have been an accomplice, and conversely if McKenzie was an accomplice, appellant of necessity, gave the money to him.

V

THE COURT DID NOT COMMIT ERROR IN REFUSING TO ADMIT EVIDENCE THAT APPELLANT WAS ACQUITTED IN UNITED STATES COMMISSIONER'S COURT FOR ILLEGAL FISHING AT RED FISH BAY AUGUST 10, 15 and 16, 1948.

Appellant alleges as error the refusal of the Court to admit evidence that defendant was acquitted in United States Commissioner's Court for illegal fishing in the waters of Red Fish Bay on August 10, 15 and 16, 1948. Appellant and his witness Hugh Harris emphatically denied catching any fish in the waters of the Bay (Appellant's testimony T.R. 134-135; Hugh Harris' testimony 79); Richard Harris denied it by inference (T.R. 106-107). This was against the testimony of one Government witness William McKenzie (T.R. 31-35, 49-52) to the effect that Appellant and his crew did fish on August 15, and 16, 1949. No ob-

jection was made to this testimony (T.R. 22-39) and is was further developed on cross-examination of the government witness (T.R. 44, 49-51, 53). Counsel for Defendant advised the Trial Court (T.R. 150) that the offered evidence was not a defense to the charge of bribery, but that it was offered for the purpose of giving the Jury a proper instruction as is shown in the argument under Issue No. 6 of this brief. The Court gave an instruction No. 14 (T.R. 166) in substantially the same language as suggested by Counsel (T.R. 54-55, 150-152).

The evidence of Appellant's illegal fishing on August 15 and 16, 1948 was connected with and was a constituent element of the bribery. It tended to establish his motive and intent in committing the offense of bribery. *Fall v. United States* (U.S.C.A.-D.C.) 49 F 2d 506, 512, Cer. Den. 277 U.S. 609.

It is respectfully submitted that Appellant's rights were adequately protected by the instruction suggested by his Counsel and given by the Court in No. 14 (T.R. 166), and Appellant not having objected that the instruction insufficiently restricted the consideration by the Jury of the evidence of illegal fishing he may not raise the issue on appeal. Rule 30, Federal Rules of Criminal Procedure.

Authorities cited by Appellant 16 C.J. p. 592, Sec. 1142, and 22 C.J.S. p. 1113, Sec. 690 are supported only by *Mitchell v. State*, 37 So. 76, and *Koenigstein v. State*, 162 N.W. 879. These authorities are cited in a

part of Corpus Juris and Corpus Juris Secundum which explain the principal that evidence of similar but separate and unconnected crimes may be shown as proof of the identity of the defendant in the crime charged, or to prove that the defendant was engaged in a plan or scheme of committing similar crimes to the one for which he was charged, which is an exception to the general rule that evidence of other offenses may not be introduced to prove the crime charged. They should therefore be distinguished from the case at bar. Here the evidence of illegal fishing was connected with and constituted a part of the bribery of McKenzie. *Fall v. United States, supra.* The jury could base its verdict only upon the evidence relating to the offense of bribery, and not upon the opinion of another jury in determining the same or different questions in another case in which the elements and facts of the offense were entirely different.

VI

THE COURT DID NOT COMMIT ERROR IN REFUSING APPELLANT'S REQUESTED INSTRUCTION NO. 1.

The instruction given by the Court on the point requested was Instruction No. 14, which reads as follows:

“Testimony has been admitted showing, or tending to show, that the defendant fished unlawfully in Red Fish Bay. This evidence was admitted not to

prove that the defendant violated the fisheries law, but to be considered by you in determining, in connection with all the other evidence, whether the defendant committed the crime charged in the Indictment." This Instruction substantially covered the point suggested by counsel for defendant before the trial court wherein he stated that the Court should instruct the jury "that the evidence of illegal fishing had been admitted here but may only be considered by the jury in so far as it may prove or tend to prove the charge of bribery for which the defendant is here on trial." (T.R. 54-55; 150, 151, 152.)

The trial court need not instruct the jury in the precise form and language as requested by defendant's counsel as long as the instruction fairly covers the points raised by the evidence.

Cataneo v. United States (C.C.A.-4) 167 F
2d 820, 824

Thayer v. United States (C.C.A.-10) 168 F
2d 247

Wheeler v. United States (U.S.C.A.-D.C.)
165 F 2d 225, 228, Cer. Den. 333 U.S.
829

Further, Appellant's requested Instruction No. 1 contained matter which was not in evidence, namely that defendant had been tried before a jury and found not guilty of three charges of illegal fishing in Red Fish Bay, Alaska, on August 10, 15, and 16, 1948.

CONCLUSION

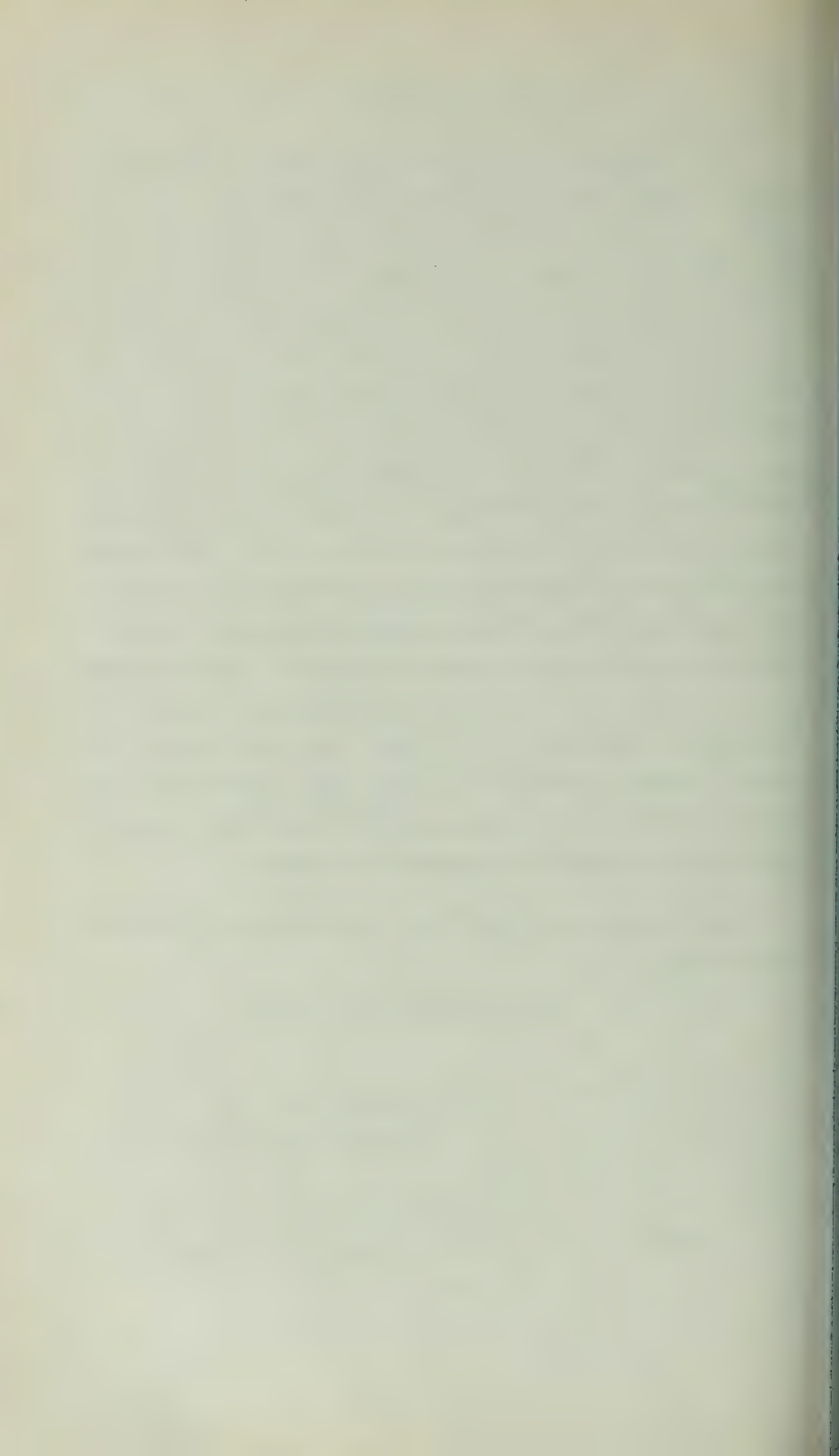
No reversible error was committed by the Trial Court in this case. It clearly appears that William McKenzie was employed by the Fish and Wildlife Service, Department of Interior in the performance of duties and functions of that Department of Government, and that he was a person acting for and on behalf of the United States in an official function. No error was made in instructing the Jury that Government witness William McKenzie was performing a function of the Department of Interior as the evidence on this point was clear and not controverted. There was no evidence that McKenzie was an accomplice of Appellant, and therefore an instruction of caution in considering his testimony was not warranted. Further the Court did not commit error in refusing evidence of Appellant's acquittal in another case pertaining to illegal fishing at Red Fish Bay and instructing the Jury to consider the evidence of the illegal fishing only in so far as it tended to prove the bribery.

The judgment of the Trial Court should therefore be affirmed.

Respectfully submitted,

P. J. GILMORE, JR.,
United States Attorney.

STANLEY D. BASKIN,
Assistant U. S. Attorney.



No. 12295

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL BRASS WORKS, INC., a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

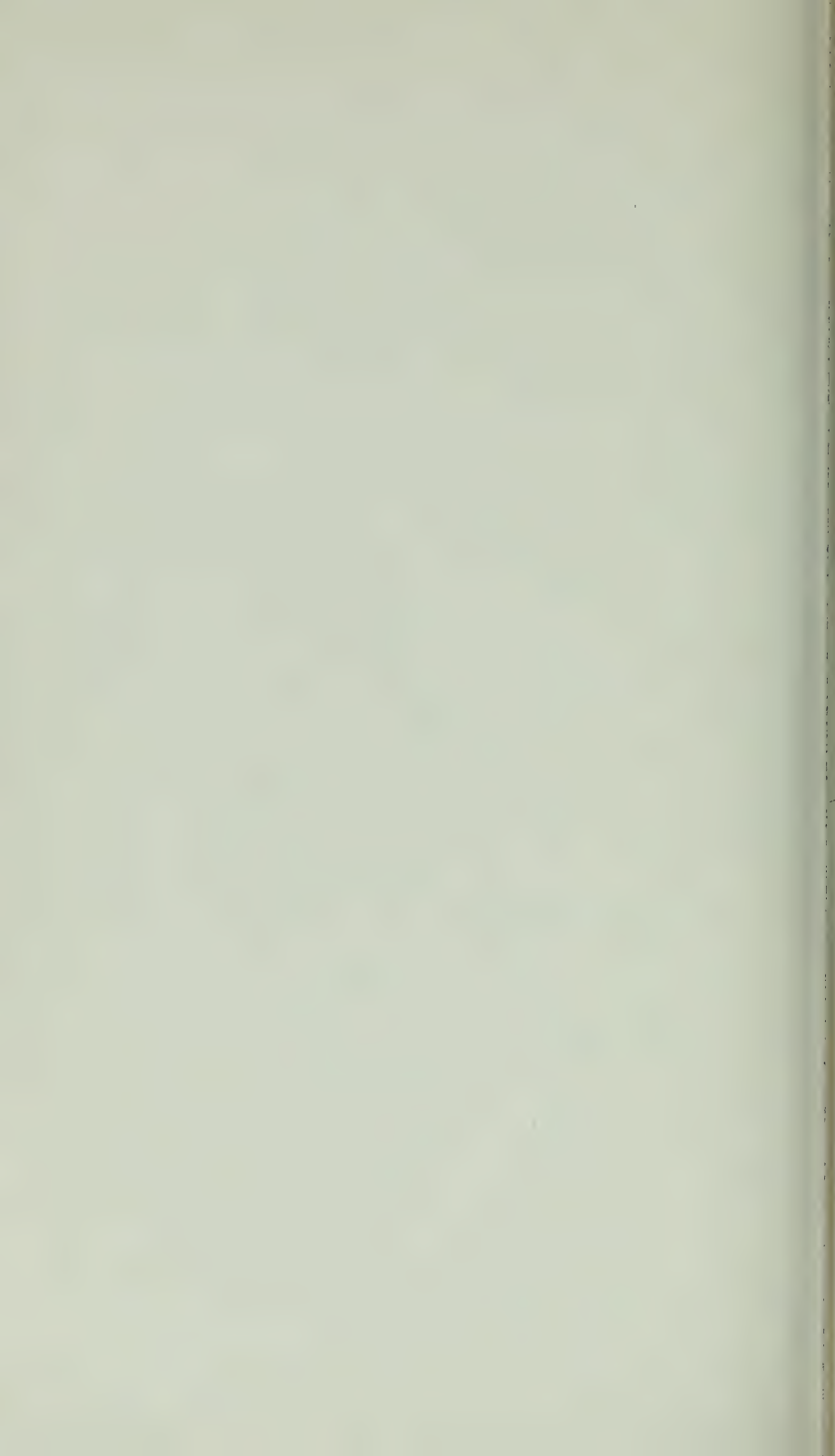
Transcript of Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED
SEP 21 1949

Sept - 21 - 49

PAUL P. O'BRIEN,
CLERK



No. 12295

United States
Court of Appeals
For the Ninth Circuit.

NATIONAL BRASS WORKS, INC., a corporation,

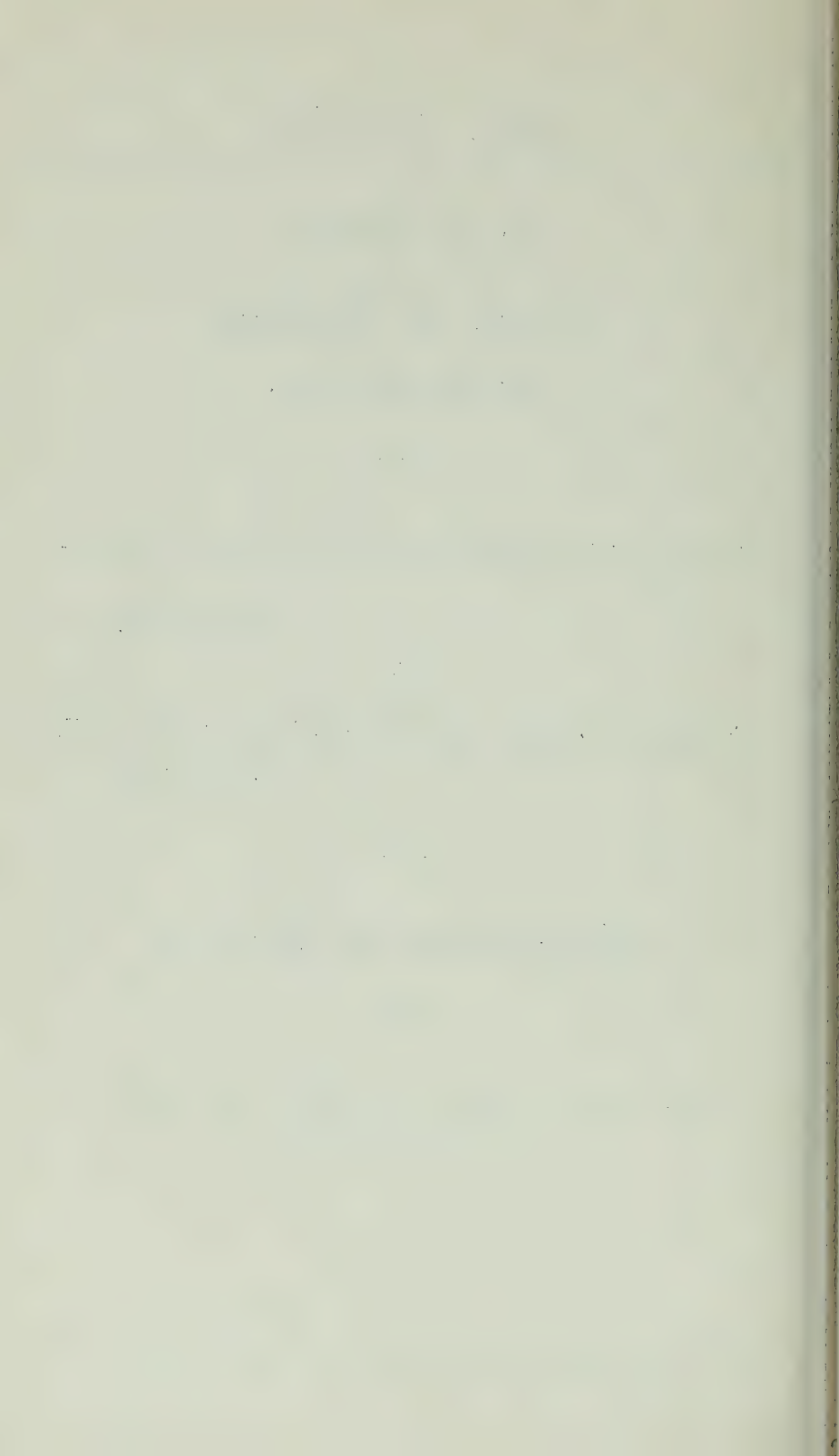
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Bureau of Internal Revenue.

The Tax Court of the United States

Docket No. 13434

NATIONAL BRASS WORKS, INCORPORATED

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named Petitioner hereby petitions for redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency (LA:IT:90D:PAK) dated January 21, 1947, and as a basis of its proceeding alleges as follows:

1. That Petitioner is a corporation with its office at 2140 East 25th Street, Los Angeles, California. The return for the period here involved was filed with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

2. A Notice of Deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the Petitioner on January 21, 1947.

3. The tax in controversy is income tax for the calendar year 1944, in the amount of \$2,911.85, which represents the deficiency determined by the Commissioner.

4. The determination of tax set forth in said

Notice of Deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing a deduction from gross income of the taxable year in the amount of \$13,071.08 paid in settlement of alleged violation of maximum price regulation of the Office of Price Administration.

(b) The Commissioner erred in failing to allow the amount of \$13,071.08 as additional cost of goods sold in determining Petitioner's gross income for the taxable year.

5. The facts upon which Petitioner relies as the basis of this proceeding are as follows:

(a) On or about July 14, 1944, Petitioner made a payment of \$13,071.08 by its check in favor of the Treasurer of the United States. Said check was delivered to a representative of the United States Office of Price Administration who gave a receipt therefor purporting to be "in settlement of the Administrator's claim for treble damages on account of violations of ceiling prices for nonferrous castings under R.M.P.R. 125."

(b) Prior to July 14, 1944, Petitioner purchased nonferrous metals from smelters which it converted into castings to be sold to customers for resale or for use in fabricating articles for sale. "Ceiling" prices were established for such castings by regulations of the Office of Price Administration and all sale contracts were made by Petitioner in conformity with such regulations.

(c) Some time after Petitioner's "ceiling"

prices were originally fixed, the Office of Price Administration retroactively adjusted the selling prices of smelters of non-ferrous metals, as a consequence of which Petitioner received rebates from the smelters upon metal previously furnished as well as the benefit of the lower prices on subsequent purchases.

(d) At the time of the aforesaid reduction in smelter prices and as a part of such adjustments the smelters were permitted to charge an offsetting freight differential in the form of a specified price per pound from certain basing points, whereas prior thereto no such freight charge had been permitted.

(e) Regulations issued by the Office of Price Administration contained general provisions requiring Petitioner to modify its "ceiling" prices when price adjustments were made by smelters. Petitioner believed that it should be permitted to take into consideration the new freight differential as an offset to the reduction in smelter prices for purposes of modifying its "ceiling" prices. Petitioner, together with other non-ferrous foundries, sought to obtain approval of said freight offset by the Office of Price Administration. The controversy over that point had not been settled on July 14, 1944.

(f) Petitioner has at all times in good faith endeavored to comply with maximum price regulations. As soon as the reduction in smelter prices had been made, Petitioner promptly modified its "ceiling" prices on all sales contracts thereafter

obtained based upon the full price adjustment without offset for freight differential. On sales contracts already in effect Petitioner continued to bill its sales at its old "ceiling" price pending disposition of the freight question.

(g) While the foregoing price procedure on the part of Petitioner was in effect, Petitioner's books and records were examined by an investigator from the Office of Price Administration. Said investigator informed Petitioner that it had been violating maximum price regulations and had thereby laid itself open to dire penalties. Petitioner explained that it had given full effect to the gross smelter price reduction in modifying its "ceiling" prices on all new business and that it was only awaiting settlement of the freight differential question in order to ascertain the proper adjustments, if any, on deliveries under its old contracts. Petitioner's explanations were brushed aside by the investigator as mere evasions.

(h) Petitioner expressed its desire and readiness at all times to conform with the laws governing control of prices and suggested that it was ready and willing to promptly rebate to customers on its old contracts the gross smelter price reduction less freight differential. Petitioner was informed by the investigator that such procedure was not satisfactory. Petitioner thereupon suggested that it rebate to said customers the gross smelter price reduction subject to future adjustments on account of freight differential in the event of an ultimate

ruling permitting such offset. That offer was likewise rejected by the said investigator.

(i) Upon being advised by the aforesaid investigator that unless Petitioner promptly paid over to the Office of Price Administration the full amount of overcharges based upon the gross reduction in smelter prices and without offset for freight differentials, he, the said investigator, would see to it that an Administrator's suit for treble damages would be brought and that more serious consequences would follow. Petitioner thereupon, on or about July 14, 1944, paid to the Office of Price Administration the sum of \$13,071.08, representing the amount of overcharges determined by the aforesaid investigator on the basis of gross smelter price reductions without offset for any freight differentials, without, however, abandoning its right to further pursue the controversy over the question of freight differentials. Petitioner understood that if payment were thus made the persons ultimately entitled thereto would receive their proper benefits.

(j) The aforesaid payment of \$13,071.08 constituted a part of the cost of goods sold during the taxable year, or in the alternative, an ordinary and necessary business expense. The Respondent disallowed the deduction of the said amount claimed in Petitioner's return.

Wherefore, the Petitioner prays that this Court hear the proceeding and determine that Petitioner was and is not liable for any income tax for the year 1944, that Petitioner is not liable for the de-

iciency in income tax proposed by Respondent for the year 1944, and for such other and further relief as to the Court may seem meet and proper.

/s/ TODD W. JOHNSON,

/s/ DONALD C. McGOVERN,

Attorneys for Petitioner.

State of California,

County of Los Angeles—ss.

Margaret H. Ruegg, being first duly sworn, upon oath deposes and says: That she is President of the Petitioner corporation; that as such officer she is duly authorized to verify the foregoing Petition of National Brass Works, Incorporated; that she has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief and those she believes to be true.

/s/ MARGARET H. RUEGG,

President National Brass
Works, Incorporated.

Subscribed and sworn to before me this 28th day of March, 1947.

[Seal] /s/ GRACE L. RUEGG,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 18, 1950.

EXHIBIT "A"

Form 1279

SN-IT-7

Treasury Department
Internal Revenue Service
417 South Hill Street,
Los Angeles 13, California.

Office of Internal Revenue Agent in Charge Los
Angeles Division.

January 21, 1947.

LA:IT90D:PAK

National Brass Works, Incorporated,
2140 East 25th Street,
Los Angeles 11, California.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1944, discloses a deficiency of \$2,911.85, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward

it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,

~~ROBERT E. HANNEGAN,~~

Commissioner,

By /s/ GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

PAK:vmc

Enclosures:

Statement

Form of waiver.

Statement

LA:IT:90D:PAK

National Brass Works, Incorporated,

2140 East 25th Street,

Los Angeles 11, California.

Tax Liability for the Taxable Year

Ended December 31, 1944

| | Liability | Assessed | Deficiency |
|------------------|------------|----------|------------|
| Income Tax | \$2,911.85 | \$ | \$2,911.85 |

In making this determination of your income tax liability careful consideration has been given to the

report of examination dated May 1, 1945, to your protest dated July 5, 1945 and to the statements made at conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Todd W. Johnson, 433 South Spring Street, Los Angeles 13, California, in accordance with the authorization contained in the power of attorney executed by you.

| Adjustments to Net Income | |
|---|--------------------|
| Net income as disclosed by return (Loss)..... | (\$ 1,110.48) |
| Unallowable deduction: | |
| (a) Settlement of claim disallowed..... | 13,071.08 |
| Total | \$11,960.60 |
| Additional deductions: | |
| (b) Capital stock tax..... | \$437.50 |
| (c) Depreciation | 368.08 805.58 |
| Net income adjusted..... | \$11,155.02 |

Explanation of Adjustments

(a) It is held that an item in the amount of \$13,071.08, representing "Settlement of administrator's claim for treble damages on account of violation of ceiling prices," and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23(a) or (f) of the Internal Revenue Code.

(b) It is determined that the correct deduction for capital stock tax is the amount of \$12,568.09 instead of the amount, \$12,130.59, claimed in your return, or an increase of \$437.50.

(c) A deduction is allowed in the amount of \$368.08 for depreciation on items charged to repairs in 1942 and 1943 but which have been disal-

lowed as deductions in those taxable years because they represent capital expenditures.

Computation of Income Tax

| | |
|------------------------------------|-------------|
| Net income adjusted..... | \$11,155.02 |
| Normal-tax net income..... | 11,155.02 |
| Surtax net income..... | 11,155.02 |
| Income tax: | |
| Normal tax: | |
| 15% of \$5,000.00..... | \$ 750.00 |
| 17% of \$6,155.02..... | 1,046.35 |
| | <hr/> |
| \$ 1,796.35 | |
| Surtax: | |
| 10% of \$11,155.02..... | 1,115.50 |
| | <hr/> |
| Correct income tax liability..... | \$ 2,911.85 |
| Income tax assessed: | |
| Original, account No. 9202604..... | <hr/> |
| Deficiency of income tax..... | \$ 2,911.85 |

Served April 7, 1947.

[Endorsed]: Filed T. C. U. S. April 4, 1947.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4(a) and (b). Denies that the respondent erred as alleged in subparagraphs (a) and (b) of paragraph 4 of the petition.

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (i), inclusive. Denies the allegations contained in subparagraphs (b) to (i), inclusive, of paragraph 5 of the petition.

(j). Admits that the respondent disallowed the deduction of \$13,071.08 claimed in petitioner's return as alleged in subparagraph (j) of paragraph 5 of the petition, but denies the remainder of said subparagraph.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,

ECC

Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
E. C. CROUTER,
H. A. MELVILLE,
Special Attorneys,
Bureau of Internal Revenue.

Received May 21, 1947.

[Endorsed]: Filed T. C. U. S. May 21, 1947.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed, by and between the parties hereto, through their respective counsel, that the following facts shall be taken as true, and that the following described exhibits may be received in evidence, without prejudice to the right of either party to introduce other and further evidence not inconsistent herewith:

1. Petitioner is a corporation which filed its Federal tax returns, for the calendar year 1944, with the Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

2. Petitioner keeps its books and records and files its Federal tax returns on the accrual basis.

3. The tax in controversy is income tax for the calendar year 1944, in the amount of \$2,911.85, which represent the deficiency determined by respondent.

4. During the period involved, petitioner was engaged in the business of making and selling non-ferrous castings of brass and bronze alloy.

5. Under the Emergency Price Control Act of 1942 (Public Law 421-77th Congress, 2nd Session) approved January 30, 1942, the Office of Price Administration was empowered to regulate the selling prices of certain products, including non-ferrous castings and the brass and bronze alloy ingots from which said castings are made.

6. The Office of Price Administration promulgated Price Regulation 202, dated August 13, 1942, effective August 19, 1942, which regulated the sell-

ing prices of brass and bronze alloy ingots and provided, in part, as follows:

“Sec. 1309.151. On and after August 10, 1942, regardless of any contract * * * no person shall sell * * * at a price higher than the maximum price established * * *”

7. Said Regulation 202 further provided:

“Sec. 1309.165-Appendix A. Maximum prices for brass and bronze alloy ingot. (a) Delivery charges. The maximum prices herein established for brass and bronze alloy ingot include transportation costs to any destination within the continental United States, not exceeding 25 cents per hundred those so included may be charged to, and paid by, weight. Actual transportation costs in excess of the buyer.”

A schedule of maximum prices for various classifications of brass and bronze alloy ingots is thereafter set forth in the said Regulation 202.

8. Petitioner, at all times material hereto, purchased its requirements of brass and bronze alloy ingots from H. Kramer & Co., Chicago, Illinois. The following described invoices for ingots purchased by petitioner from H. Kramer & Co. are attached hereto as joint exhibits, viz.:

| Joint Exhibit No. | Date | Invoice No. |
|-------------------|---------|-------------|
| 1-A | 6-23-42 | 17055 |
| | 8-11-42 | 17515 |
| | 8-28-42 | 17732 |
| | 9-17-42 | 17917 |
| 2-B | 7-31-42 | 17414 |
| | 9-21-42 | 17956 |

smelters & refiners of metals

| | | | |
|---------------------------|--|----------------|--|
| REGISTER NO. | | VOUCHER NO. | |
| P. O. B. CHECKED | | PRICE APPROVED | |
| TERMS APPROVED | | PRICE APPROVED | |
| CALCULATIONS CHECKED | | PRICE APPROVED | |
| TRANSPORTATION | | PRICE APPROVED | |
| FREIGHT BILL NO. | | AMOUNT | |
| MATERIAL RECEIVED | | AMOUNT | |
| DATE | | SIGNATURE | |
| IS | | TITLE | |
| SATISFACTORY AND APPROVED | | TITLE | |
| ADJUSTMENTS | | TITLE | |
| ACCOUNTING DISTRIBUTION | | TITLE | |
| AUDITED | | FINAL APPROVAL | |

17055
17055
N^o 17055
JUNE 23, 1942

B-502 B-549 CHICAGO
GENERAL OFFICE & PLANT
812 AND 808 WEST 10TH
TELEPHONE CANAL REED

SOLD TO
NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

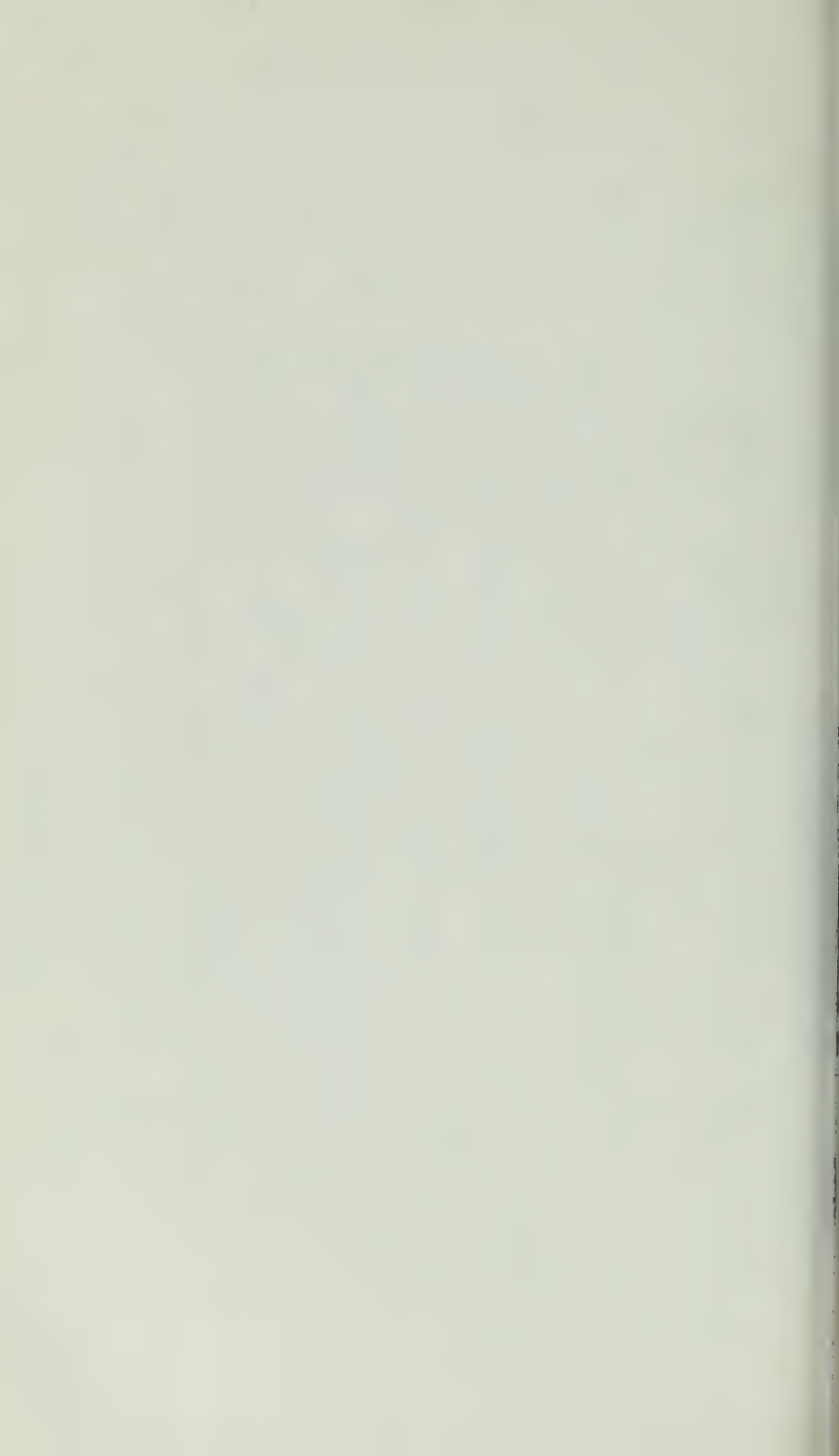
FROM LOS ANGELES STOCK
P. O. B. YOUR PLANT
PREPAID OR COLLECT
TRUCK
TERMS 1/2 of 1% 10 DAYS, NET 30 DAYS

| INGOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|--------|----------|---|--------|------------|-------------|
| 229 | 4,003# | GRADE "A" MANGANESE BRONZE INGOT (421) APPLIES ORDER B-549 PREFERENCE RATING A-1-a - ORDER P-90, SERIAL #5336 | "A" | 15.00 | \$ 600.45 |
| 197 | 4,006# | NAVY "M" INGOT (Spec. 46B8g) (245) COMPLETES ORDER B-502 PREFERENCE RATING A-1-a CERTIFICATES AN-3572299-3572303-5-36 & PD-3A's - SERIALS M-1009781-2-5 | "M" | 16.25 | \$ 650.98 |
| | | | | | \$ 1,251.43 |

PD-518A - WPB AUTHORIZATION CERTIFICATE #2449

ORIGINAL

Inv. No. _____
Rec. by _____
Date _____
Checked _____



U. K. KRAMER & CO.
smelters & refiners of metals

GENERAL OFFICE & PLANT
 8141 AND LOOMIS STREETS
 CHICAGO
 TELEPHONE CANAL 6800

CUSTOMER'S
 ORDER NO. & DATE
 REQUISITION NO.
 CONTRACT NO.

B-629

CHICAGO

REFER TO
 INVOICE

N^o 17515

17515

INVOICE DATE **AUGUST 11, 1942**
 VENDOR'S NO.

SOLD
 TO

NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

SHIPPED TO
 AND
 DESTINATION
 DATE SHIPPED
 CAR INITIALS AND NO.
 HOW SHIPPED AND
 ROUTE

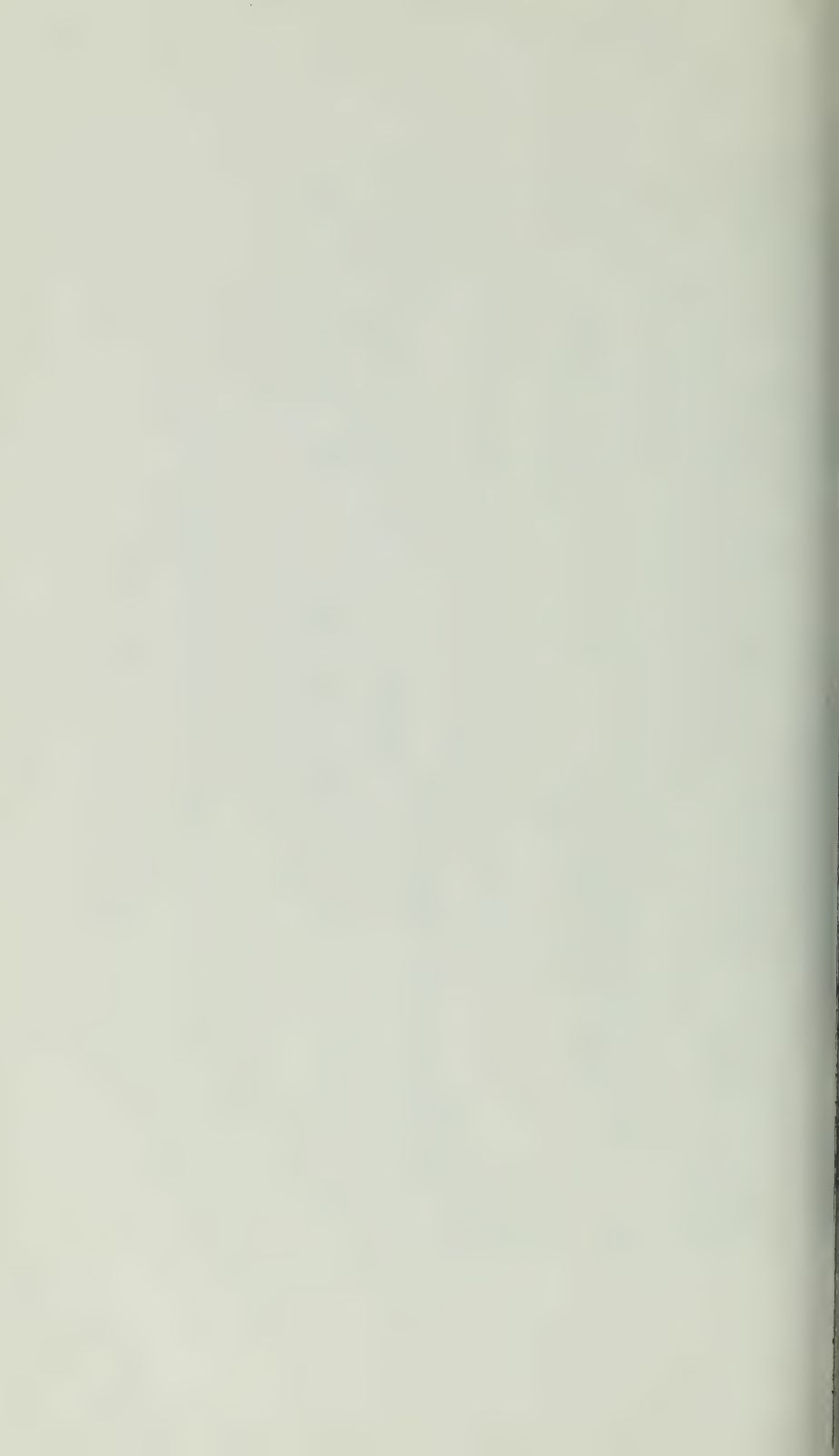
FROM **LOS ANGELES STOCK** PREPAID OR COLLECT
 P. O. B. **YOUR PLANT**

TRUCK

TERMS **1/2 of 1% 10 DAYS, NET 30 DAYS**

| | | | |
|-------------------------|--|---------------------------|-------|
| DESTINATION NO. | | P. O. B. CHECKED | |
| TERMS APPROVED | | PRICE APPROVED | |
| CALCULATIONS CHECKED | | | |
| TRANSPORTATION | | | |
| FREIGHT BILL NO. | | AMOUNT | |
| MATERIAL RECEIVED | | | |
| DATE | | SIGNATURE | TITLE |
| | | SATISFACTORY AND APPROVED | |
| ADJUSTMENTS | | | |
| ACCOUNTING DISTRIBUTION | | | |
| AUDITED | | FINAL APPROVAL | |

| INGOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|--|----------|--|--------|------------|-------------|
| 441 | 9,014# | NAVY "G" INGOT (88-8-0-4) (225) PREFERENCE RATINGS AA & A-1-a USN 2.30 | WGN | 18.25 | \$ 1,645.06 |
| PD-518A - WPB AUTHORIZATION CERTIFICATE #2449 <div> ORIGINAL Inv. No. <u>138</u> Rec. by <u> </u> Ext. C. K. <u> </u> Price O. K. <u> </u> Charge <u>Max</u> </div> | | | | | |



smelters & refiners of metals

GENERAL OFFICE & PLANT
512 AND LOOMIS STREETS
TELEPHONE CANAL 4888

CUSTOMER'S
ORDER NO. & DATE
REQUINITION NO.
CONTRACT NO.

B-567-618-636 CHICAGO

17732

SEND TO
INVOICE

Nº 17732

INVOICE DATE **AUGUST 28, 1942**

VEHICLES **42**
Inv. No. _____

NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

Rec. by _____

Ext O.K. *O.K.*

Price O.K. *OK*

Charge _____

FROM **CHICAGO (THRU LOS ANGELES-STOCK)**
P. O. B. **YOUR PLANT**

TRUCK

1/2 of 14 10 DAYS, NET 30 DAYS

SHIPPED TO
AND
DESTINATION
DATE SHIPPED
CAR INITIALS AND NO.
HOW SHIPPED AND
ROUTE

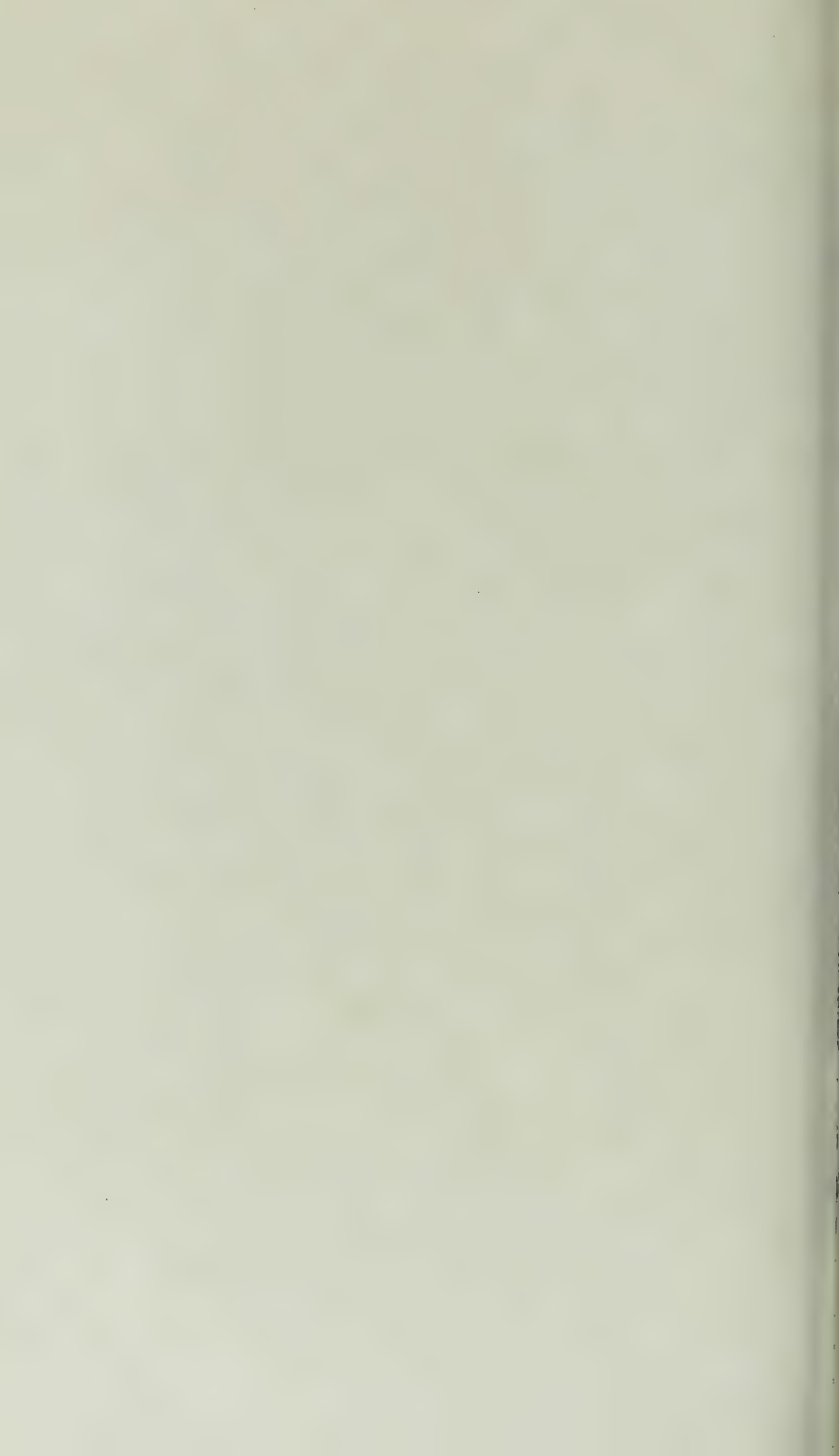
TERMS

| INQOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|--------|----------|---|--------|------------|-------------|
| 358 | 7,990# | ✓ COMMERCIAL 88-10-2 INGOT (215) ✓ APPLIES ORDER B-567 - USN 2.00 ✓ RATINGS A-1-a & b ORDER P-90, SERIAL #5336 ✓ NAVY "W" INGOT (245) ✓ APPLIES ORDER B-618 - USN 2.50 - RATING A-1-a ✓ COMMERCIAL 88-10-2 INGOT (215) ✓ COPPER SILICON ALLOY INGOT (NAVY 46B28) (500) ✓ ABOVE TWO ITEMS COMPLETE ORDER B-636 ✓ RATING A-1-a - ORDER P-90, SERIAL #5336 - DP 9.20 " A-1-a - " P-90, " #4982B | W | 17.75 | \$ 1,418.22 |
| 43 | 10,124# | | W | 15.50 | 1,569.22 |
| 95 | 1,900# | | W | 17.25 | 327.75 |
| 5 | 102# | | W | 16.25 | 16.58 |
| | | | | | \$ 3,331.77 |

ORIGINAL

PD-518A - WPB AUTHORIZATION CERTIFICATE #2449

THE ABOVE PRICES INCLUDE 0.75¢ PER POUND TO APPLY ON TRANSPORTATION COSTS IN EXCESS OF 0.25¢ PER POUND. CARRIAGE FREIGHT RATE FROM CHICAGO TO LOS ANGELES \$1.17 PER CWT.



smelters & refiners of metals

GENERAL OFFICE & PLANT
5121 AND LOOMIS STREETS
TELEPHONE CANAL 6800

CUSTOMER'S
ORDER NO. & DATE
REQUESTION NO.
CONTRACT NO.

B-621-2-8-9-688-CHICAGO

REFER TO
INVOICE

N^o 17917

INVOICE DATE
VENDOR'S NOS

SEPTEMBER 17, 1942

Inv. No.

43

SOLD
TO

NATIONAL BRASS WORKS, INC.

2140 E. 25TH STREET

LOS ANGELES, CALIFORNIA

Rec. by

File

SHIPPED TO
AND

DATE SHIPPED
DESTINATION

CAR INITIALS AND NO.
HOW SHIPPED AND
ROUTE

TRUCK

TERMS 1/2 of 15 10 DAYS, NET 30 DAYS

FROM CHICAGO (THRU LOS ANGELES IN STOCK)

F. O. B. YOUR PLANT

ACCOUNTING DISTRIBUTION

AUDITED

MARKED

INGOTS

QUANTITY

DESCRIPTION

UNIT PRICE

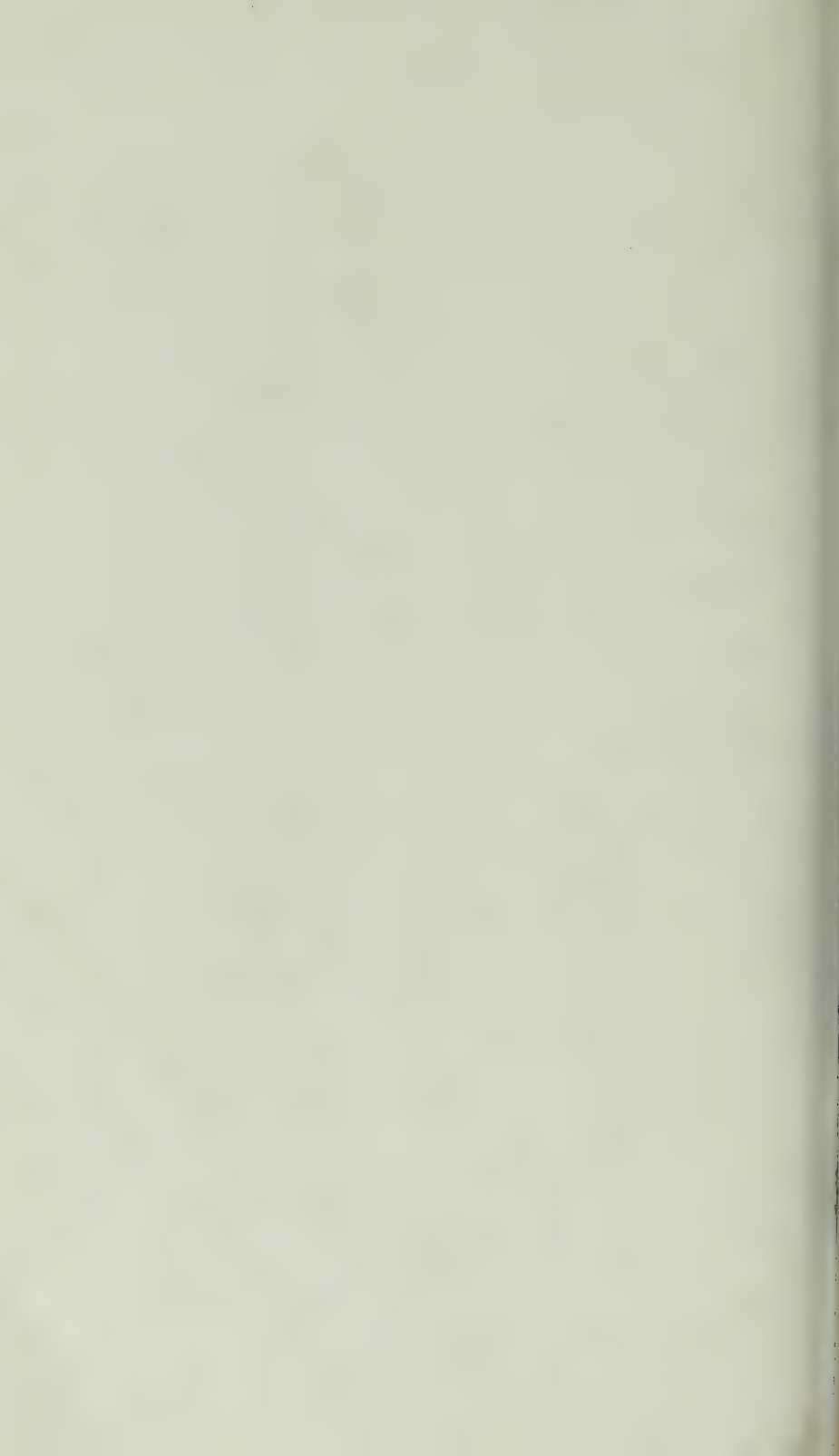
AMOUNT

| | | | | | |
|-----|--------|--|---------|---------------------|-------------|
| 153 | 2,860# | GRADE "A" MANGANESE BRONZE INGOT (421) APPLIES ORDER B-621 - USN 2.90 | "A" | 14.50 | \$ 414.70 |
| 190 | 3,518# | GRADE "A" MANGANESE BRONZE INGOT (421) COMPLETES ORDER B-622 - USN 2.35-1518# | "A" USN | 14.50 2.90-2000# | 510.11 |
| 53 | 1,000# | GRADE "A" MANGANESE BRONZE INGOT (421) COMPLETES ORDER B-629 - USN 2.30 | "A" | 14.50 | 145.00 |
| 85 | 1,600# | GRADE "A" MANGANESE BRONZE INGOT (421) COMPLETES ORDER B-686 - USN 2.90 | "A" | 14.50 | 232.00 |
| 13 | 250# | GRADE "A" MANGANESE BRONZE INGOT (421) | "A" | 14.50 | 36.25 |
| 24 | 516# | NAVY "G" INGOT (225) ABOVE TWO ITEMS COMPLETE ORDER B-628 - USN 2.31 | "G" | 17.50 | 90.30 |
| | | | | | \$ 1,428.36 |

PD-518A - WPB AUTHORIZATION CERTIFICATE #4210

ORIGINAL

THE ABOVE PRICES INCLUDE 0.25% PER POUND TO APPLY ON TRANSPORTATION COSTS IN
EXCESS OF 0.25% PER POUND. CARLOAD FREIGHT RATE FROM CHICAGO TO LOS ANGELES
\$1.17 PER CWT.



smelters & refiners of metals

GENERAL OFFICE & PLANT
2142 AND LOOMIS STREETS
TELEPHONE CANAL 8800

CUSTOMER'S
ORDER NO. & DATE
REQUISITION NO.
CONTRACT NO.

B-567

CHICAGO

REFER TO
INVOICE

N^o 17414

INVOICE DATE JULY 31, 1942

VENDOR'S NOS.

SOLD
TO

NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

SHIPPED TO
AND
DESTINATION
DATE SHIPPED
CAR INITIALS AND NO.
HOW SHIPPED AND
ROUTE

FROM LOS ANGELES STOCK
P. O. B. YOUR PLANT

PREPAID OR COLLECT

TRUCK

TERMS 1/2 of 15 10 DAYS, NET 30 DAYS

| INGOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|--------|----------|---|--------|------------|-------------|
| 484 | 10,010# | COMMERCIAL 88-10-2 INGOT (215) PREFERENCE RATING A-1-a & b PREFERENCE RATING ORDER P-90, SERIAL #5336 PD-518A - WPB AUTHORIZATION CERTIFICATE #2449 (JULY) | WM | 17.75 | \$ 1,776.78 |

Inv. No. 48

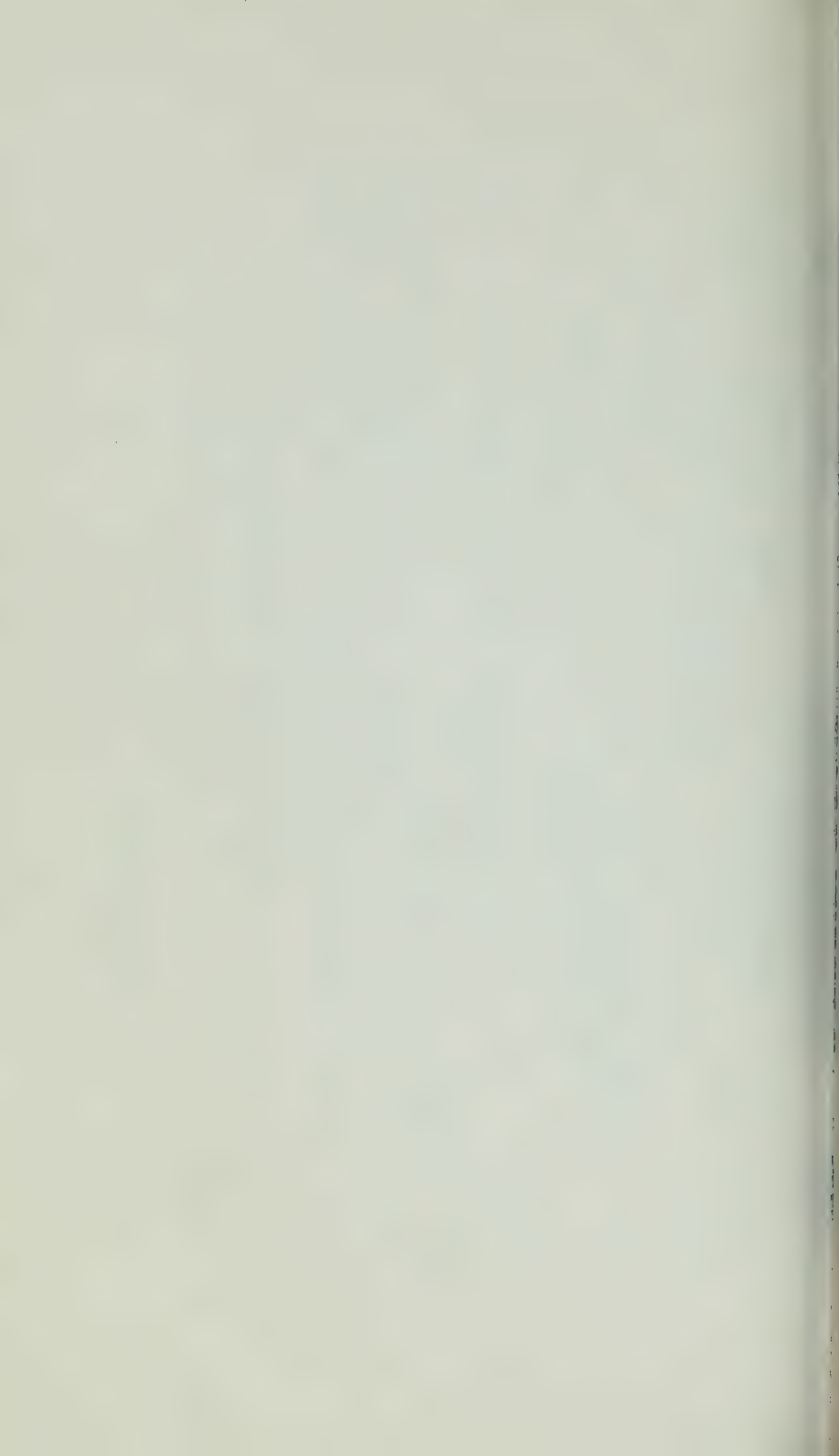
Rec. by Max

Ext. Cl. K. Max

Trans. Cl. Max

CHECKED Max

| | | | |
|----------------|-------------------------|---------------------------|----------------|
| REGISTERED NO. | P. O. B. CHECKED | TERMS APPROVED | PRICE APPROVED |
| | | CALCULATIONS CHECKED | |
| | TRANSPORTATION | | |
| | FREIGHT BILL NO. | | AMOUNT |
| | MATERIAL RECEIVED | | |
| | DATE | SIGNATURE | TITLE |
| | | SATISFACTORY AND APPROVED | |
| | ADJUSTMENTS | | |
| | ACCOUNTING DISTRIBUTION | | |
| | AUDITED | | FINAL APPROVAL |





H. K. KRAMMER & CO.
smelters & refiners of metals

GENERAL OFFICE & PLANT
2147 AND LOOMIS STREETS
TELEPHONE CANAL 9600

CUSTOMER'S
ORDER NO. & DATE **B-567**
REQUISITION NO.
CONTRACT NO.

17956
N^o 17956
REFER TO
INVOICE
INVOICE DATE **SEPTEMBER 21, 1942**
VENDOR'S NO.

| | |
|---------------------------|----------------|
| REGISTER NO. | VOUCHER NO. |
| P. O. S. CHECKED | PRICE APPROVED |
| TERMS APPROVED | PRICE APPROVED |
| COPIATIONS CHECKED | |
| TRANSPORTATION | |
| FREIGHT BILL NO. | AMOUNT |
| MATERIAL RECEIVED | |
| DATE | SIGNATURE |
| SATISFACTORY AND APPROVED | TITLE |
| ADJUSTMENTS | |

SOLD TO
NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

SHIPPED TO
AND
DESTINATION
DATE SHIPPED

FROM **CHICAGO (THRU LOS ANGELES STOCK)**
F. O. B. **YOUR PLANT**

CAR INITIALS AND NO.
DATE SHIPPED AND
ROUTE
TERMS **1 1/2 of 15 10 DAYS, NET 30 DAYS**

AUDITED
FINAL APPROVAL

| INGOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|--------|----------|-------------|--------|------------|--------|
|--------|----------|-------------|--------|------------|--------|

| | | | | | |
|-----|-----------|--------------------------------|-----|-------|-------------|
| 463 | 10,002# ✓ | COMMERCIAL 88-10-2 INGOT (215) | WNM | 17.25 | \$ 1,725.34 |
|-----|-----------|--------------------------------|-----|-------|-------------|

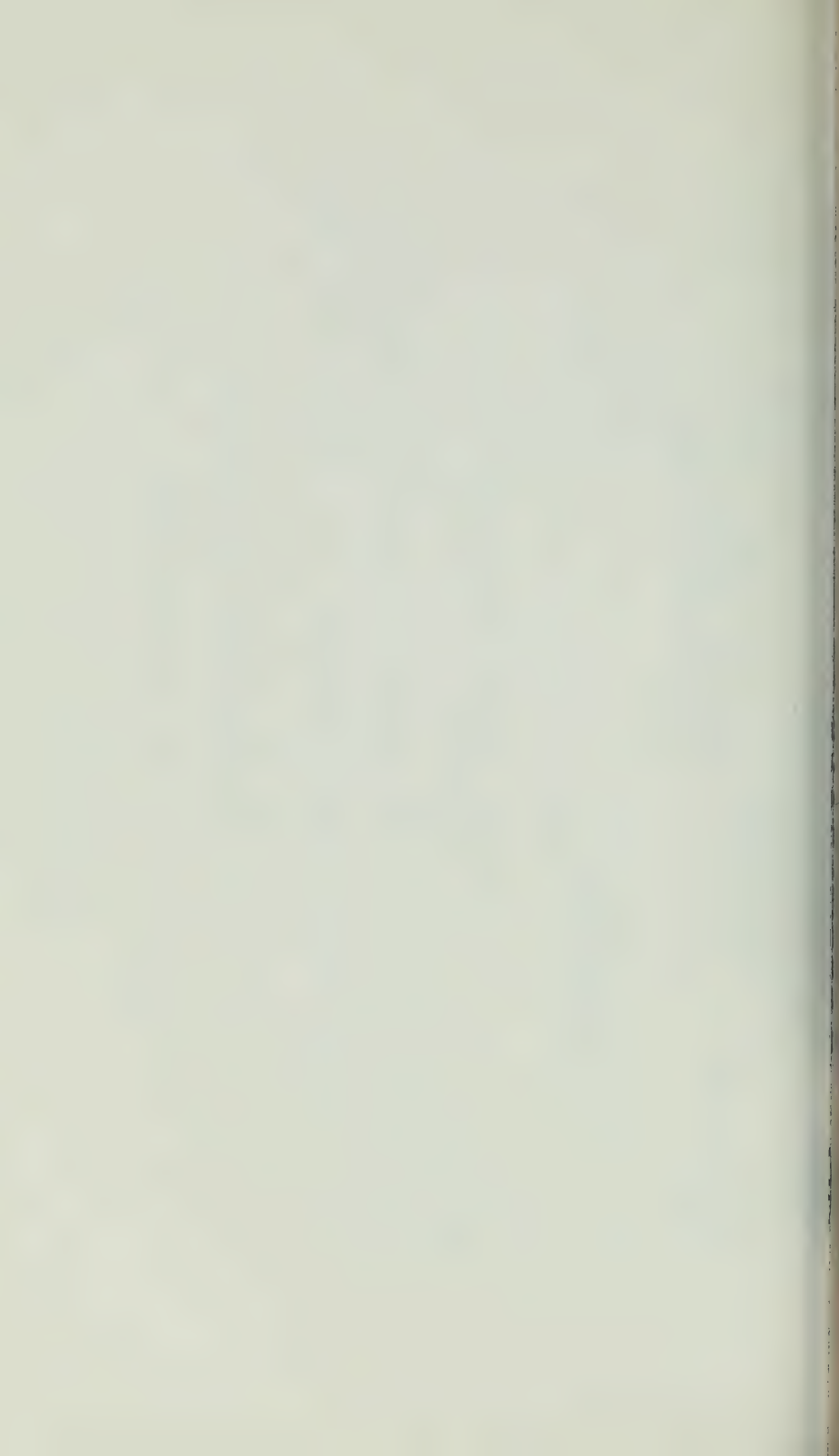
USN 2.00

PD-518A - WPB AUTHORIZATION CERTIFICATE #4210

THE ABOVE PRICES INCLUDE 0.7% AND 0.2% CHARGES TO APPLY FOR TRANSPORTATION COSTS IN
EXCESS OF 0.2% PER POUND. CARLOAD FREIGHT RATE FROM CHICAGO TO LOS ANGELES
\$1.17 PER CWT.

| | |
|-------------|-------|
| INV. NO. | 17956 |
| Rec. by | ASX |
| Ext. C. K. | ASX |
| Price C. K. | Max |
| Unit | |

ORIGINAL



W. K. P. M. C. & CO.

smelters & refiners of metals

GENERAL OFFICE & PLANT
SILVERADO, CALIFORNIA
TELEPHONE CANAL 8800

CUSTOMER'S
ORDER NO. & DATE
REGISTRATION NO.
CONTRACT NO.

B-538 568 567 CHICAGO

REFER TO
INVOICE N° 17413

INVOICE DATE ~~AT 17413~~ 7/30/42

VENDOR'S NOS.

SOLD TO
NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

SHIPPED TO
AND

DESTINATION
DATE SHIPPED
CAR INITIALS AND NO.
HOW SHIPPED AND
ROUTE

7/30/42

FROM
F. O. B.

LOS ANGELES STOCK
YOUR PLANT

PREPAID OR COLLECT

TRUCK

TERMS 1/2 of 1% 10 DAYS, NET 30 DAYS

| INGOTS | QUANTITY | DESCRIPTION | MARKED | UNIT PRICE | AMOUNT |
|-------------|----------|---|--------|------------|------------|
| 166 | 3,488# | SPECIAL 85-5-5-5 INGOT (1.40 to 1.50% Nickel) COMPLETES ORDER B-538 | "AN" | 14.00 | \$ 488.32 |
| 50- | 10,089# | SPECIAL 85-5-5-5 INGOT (1.40 to 1.50% Nickel) APPLIES ORDER B-568 PREFERENCE RATING A-1-a | "AN" | 14.00 | 1,412.46 |
| 312 | 6,499# | PREFERENCE RATING ORDER P-90, SERIAL #6336 SPECIAL 85-5-5-5 INGOT (1.40 to 1.50% Nickel) APPLIES ORDER B-567 | "AN" | 14.00 | 909.86 |
| Inv. No. | | | | | \$2,810.64 |
| Rec. by | | | | | |
| Ext. C. K. | | | | | |
| Price C. K. | | | | | |
| Signature | | | | | |

PD-518A - WPB AUTHORIZATION CERTIFICATE #2449 (JULY)

ORIGINAL

REGISTER NO. _____

VOUCHER NO. _____

F. O. B. CHECKED _____

TERMS APPROVED _____

PRICE APPROVED _____

CALCULATIONS CHECKED _____

TRANSPORTATION _____

FREIGHT BILL NO. _____

MATERIAL RECEIVED _____

DATE _____

SIGNATURE _____

SATISFACTORY AND APPROVED _____

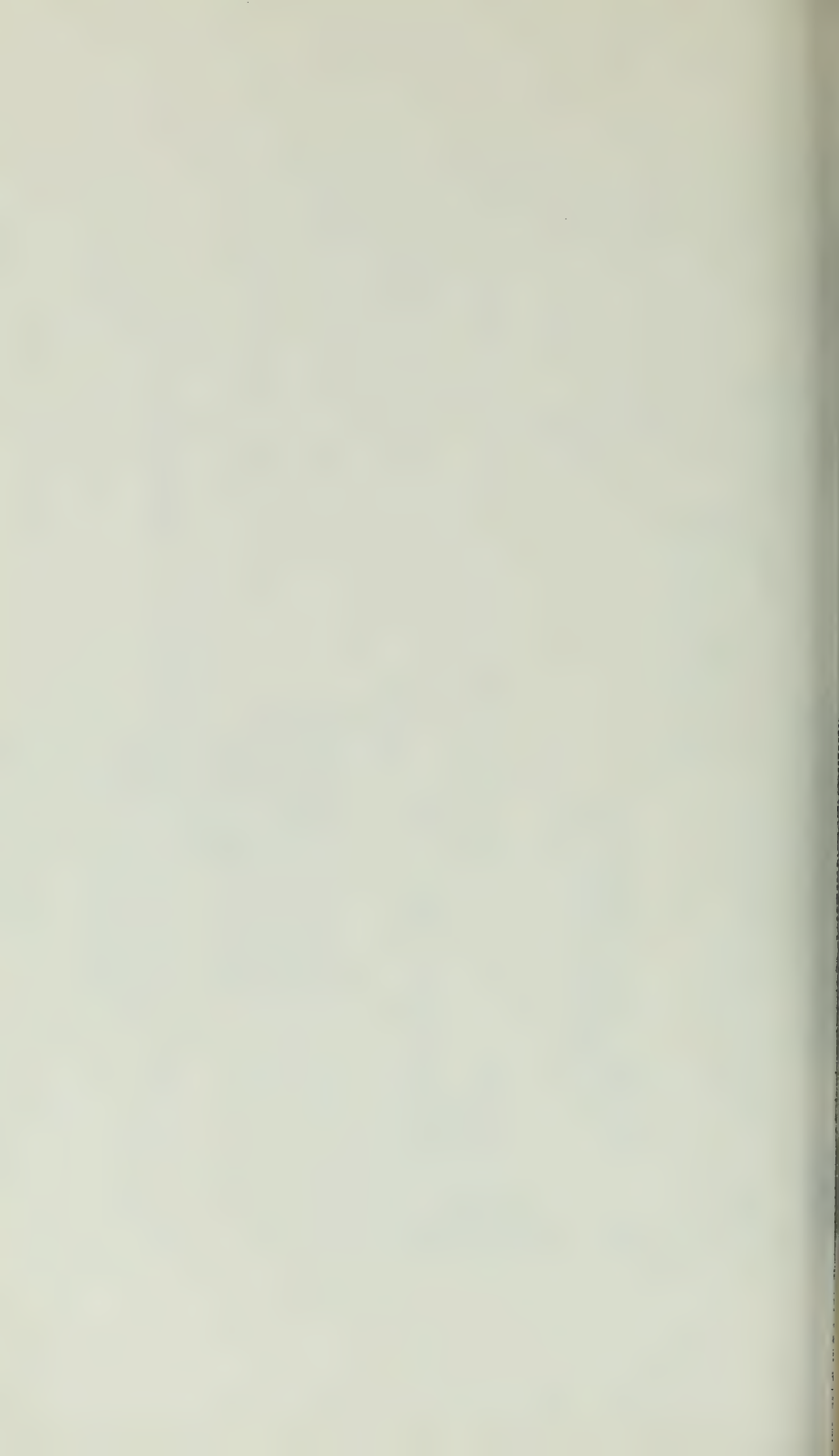
TITLE _____

ADJUSTMENTS _____

ACCOUNTING DISTRIBUTION _____

AUDITED _____

FINAL APPROVAL _____



Nº 17850

B-627 - B-646 CHICAGO

REFUSE TO

No 17850

INVOICE DATE
VENDOR'S NO.

NATIONAL BRASS WORKS, INC.
2140 E. 25TH STREET
LOS ANGELES, CALIFORNIA

FROM CHICAGO (THRU LOS ANGELES STOCK) COUNTING DISTRIBUTION

YOUR PLANT

TRICK

TERMS 1/2 of 1\$ 10 DAYS, NET 30 DAYS

THE ABOVE PERCENTAGE IS BASED ON THE ASSUMPTION THAT THE EXCESS OF COSTS FOR TRANSPORTATION COSTS IN LOS ANGELES IS \$1.00 PER CWT. TO LOS ANGELES.

| | | |
|-----|---------|-------|
| 3-C | 8-1-42 | 17413 |
| | 9-11-42 | 17850 |

9. The Office of Price Administration promulgated Revised Maximum Price Regulation 125 (hereinafter referred to as RMPR, 125) dated January 27, 1943, effective February 1, 1943, which established maximum selling prices of non-ferrous foundry products. A copy of said RMPR 125 is attached hereto as Joint Ex. 4-D.

10. Said RMPR 125, Joint Ex. 4-D, reduced petitioner's maximum selling prices one and one-half cent per pound for the castings involved herein effective February 1, 1943. Petitioner was furnished a copy of said RMPR 125 and was aware of its provisions.

11. Petitioner did not reduce its prices to its customers as required by said RMPR 125.

12. Two O.P.A. investigators appeared at petitioner's office in the spring of 1944 and examined its books.

13. As a result of said examination, the O.P.A. alleged that petitioner had violated RMPR 125. In order to settle the O.P.A. claim, the petitioner issued its check, dated July 14, 1944, made payable to the order of the Treasurer of the United States in the amount of \$13,071.08, and was given a receipt therefore reading as follows:

“Receipt

Received this 17th day of July, 1944 check No. 3539-E dated 7/14/44 in the sum of \$13,071.08, payable to the Treasurer of United States, from National Brass Works, Inc., of Los Angeles, Califor-

nia, in settlement of the Administrator's Claim for treble damages on account of violations of ceiling prices for non-ferrous castings under RMPR 125.

/s/ WM. H. BUCKINGHAM,
Enforcement Attorney."

14. In 1944, petitioner accrued on its books said \$13,071.08 as a business expense and deducted said sum in computing its income for Federal income tax purposes. The respondent, in his statutory Notice of Deficiency, disallowed said deduction with the following explanation:

"(a) It is held that an item in the amount of \$13,071.08, representing 'Settlement of administrator's claim for treble damages on account of violation of ceiling prices,' and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23(a) or (f) of the Internal Revenue Code."

The aforesaid disallowance by respondent gave rise to the instant appeal, and the allowability thereof is the only issue involved herein.

15. The said \$13,071.08 was based upon sales made by petitioner, at prices in excess of the maximum prices established under RMPR 125, which sales were made during the period February 1, 1943 to January 31, 1944, to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205(e) of the Emergency Price Control Act of 1942.

16. The said RMPR 125 was amended from time

to time. Amendment No. 3 was dated January 13, 1944, and became effective February 1, 1944. The respondent, reserving the right to object thereto on the grounds of materiality and relevancy, stipulates that attached hereto, as Joint Ex. 5-E, is a copy of said Amendment No. 3 to RMPR 125.

/s/ DONALD C. McGOVERN,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,
ECC.

Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

Rev. MPR 125 Jan. 27, 1943

JOINT EXHIBIT 4-D

Office of War Information
Office of Price Administration

Advance Release: OPA-1542

For Thursday Morning Papers, January 28, 1943.

More than 25 million dollars will be saved the Government and heavy industry in 1943 through reductions in foundry prices of 3 cents per pound for aluminum, 3 cents per pound for magnesium, and 11½ cents per pound for copper base castings.

The reductions were ordered today by the Office of Price Administration in a revision of the price regulation for nonferrous castings, effective February 1, 1943. The title is now Revised Maximum

Price Regulation No. 125—Nonferrous Castings.

The revised regulation also exempts from official price control foundries that do less than \$12,500 worth of business in a quarter. Other changes made by today's revision include:

1. Addition of a new price base period between May 11, 1942, and January 31, 1943. The former base period of October 1-15, 1941, is also available.

2. Provision that current metal prices be used in pricing formulas when pricing castings of a different class.

3. A specific requirement that foundries file their pricing formulas with the OPA.

The action to reduce foundry prices by 3 cents per pound for aluminum and magnesium and 1½ cents per pound for copper base castings requires foundries to pass on to their customers reductions in metal costs. These reductions in metal costs were the result of price reductions made by primary, secondary and scrap metal producers both through voluntary agreement with OPA and because of OPA orders, since late in 1941. The reduction in prices ordered today affects the price of castings used for tanks, airplanes, munitions, ship's propellers and other vitally important products made or used by heavy industry, manufacturers of war equipment, the Government, and transportation companies. Savings passed on to the Government would be chiefly in reduced cost of war equipment. Savings passed on to the consumer are made possible by lowered costs to private industry.

Some foundries, the OPA said, already have

passed on the savings resulting from reduced metal costs. Where reductions based on metal cost alone are equal to the cuts ordered for the industry no change will need to be made in the foundry's maximum prices as a result of today's order. A foundry may not however, count as part of the reduction ascribed to metal cost a reduction made for any other reason, such as increased production efficiency.

Those who have not made the full reductions for each pound of their aluminum, magnesium and copper base castings respectively, will be required to lower their maximum prices for castings enough to bring about the full reduction.

Current simplification of OPA procedure is illustrated by the method used for arriving at the prices for aluminum, magnesium and copper base castings at reduced metal costs. Instead of requiring each foundry to recompute its maximum price for each casting by applying reduced metal prices in its pricing formula, the OPA computed the average net reduction in metal prices and added to this the estimated average amount the foundries applied to their metal cost for metal loss, overhead and profit. The specific reductions in the price of castings arrived at in this way have the additional advantage of permitting the buyer of castings to know the exact extent of the reduction in advance and to make a corresponding reduction in the price of his products to the ultimate consumer.

An important feature of the revised regulation is the exemption from price control of the foundries that do less than \$12,500 worth of business in a

quarter. This removes from nearly all provisions of the regulation more than half of the foundries in the industry. These foundries, however, produce only about 3 per cent of the nonferrous castings, according to the OPA. The smaller foundries lack the precision equipment capable of meeting many of the stringent war requirements and are required to compete for the small amount of civilian business or the more simple war castings. Competition, therefore, places sufficient restrictions upon prices charged by these foundries.

When a foundry sells \$12,500 worth of castings or more in any quarter it will come under all provisions of the revised regulation. If it sells less than \$12,500 it will need only to file a simple report with the OPA each quarter year.

Addition of a second base period (May 11, 1942, to January 31, 1943) was made because it will establish definite base prices for the great number of castings sold, contracted for, or delivered in that period. After February 1, 1943, none of the castings sold in either this additional period or the October 1-15, 1941, period can be sold at a higher price than the most recent maximum prices established, reduced by the proper metal reduction. Where the sale is to the same buyer the maximum price is the most recent price to that buyer. At the same time, "the most recent price" must be one that was in compliance with the formula-determined prices based on October 15, 1941, costs and profits.

The maximum prices of castings that were not sold in either base period are to be figured by us-

ing the pricing formula used by the foundry on October 15, 1941, using the same costs as were used on that date except for metal cost which must be figured at current metal prices.

Under the revised regulation a clear demarcation is made as to which machined castings are within the provisions; the line is generally drawn on the basis of certain, stated percentages of machining cost in proportion to the total cost.

A brief summary of the regulation is being sent to the nonferrous foundry industry and copies of it will be available at OPA regional offices, the OPA said.

(Document No. 10236)

Part 1395—Nonferrous Foundry Products
[Rev. MPR 125¹]

Nonferrous Foundry Products

The title, preamble, and §§ 1395.1 to 1395.11, inclusive, as heretofore amended, are renumbered and amended to read as set forth below. “Revised Maximum Price Regulation 125—Nonferrous Castings.”

In the judgment of the Price Administrator the prices of nonferrous castings have risen and are threatening further to rise to an extent and in a manner inconsistent with the purposes of the Emergency Price Control Act of 1942, as amended. The Price Administrator has ascertained and given due consideration to the prices of nonferrous castings

¹F. R. 3202, 3990, 7249, 8878, 8948, 10780.

prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator the maximum prices established by this Revised Maximum Price Regulation No. 125 (referred to herein as "this regulation") are and will be generally fair and equitable and will effectuate the purposes of said Act. A statement of the considerations involved in the issuance of this regulation is issued simultaneously herewith and has been filed with the Division of the Federal Register.*

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250, and in accordance with Revised Procedural Regulation No. 12 issued by the Office of Price Administration, this regulation is hereby issued.

Sec. 1395.1. Exclusions.

Sec. 1395.2. Prohibition against sales of nonferrous castings at prices higher than maximum prices.

Sec. 1395.3. Maximum prices and report requirements for nonferrous castings sold or delivered on

*Copies may be obtained from the Office of Price Administration.

²⁷ F.R. 8961.

or after February 1, 1943—Castings the same, or of the same class as those sold or contracted to be sold by the seller during the period from October 1 to October 15, 1941, inclusive, or sold, contracted to be sold or delivered by the seller during the period from May 11, 1942, to January 31, 1943, inclusive.

Sec. 1395.4. Maximum prices and report requirements for nonferrous castings sold or delivered on or after February 1, 1943—Castings of a class different from any casting sold or contracted to be sold during the period from October 1 to October 15, 1941, inclusive, and different from any casting sold, contracted to be sold or delivered during the period from May 11, 1942, to January 31, 1943, inclusive.

Sec. 1395.5. Developmental contract and subcontract.

Sec. 1395.6. Transfer of business or stock in trade.

Sec. 1395.7. Less than maximum prices.

Sec. 1395.8. Export sales.

Sec. 1395.9. Federal and State taxes.

Sec. 1395.10. Adjustable pricing.

Sec. 1395.11. Prohibited evasion practices.

Sec. 1395.12. Applications for adjustment or petitions for amendment.

Sec. 1395.13. Records and reports.

Sec. 1395.14. Enforcement.

Sec. 1395.15. Definitions.

Sec. 1395.16. Geographical applicability.

Sec. 1395.17. Effective date.

Sec. 1395.18. Appendix A: Maximum prices for

nonferrous castings sold during the period May 11, 1942, to January 31, 1943, inclusive.

Sec. 1395.19. Appendix B: Form OPA 677:115a
—Report on net sales for foundries with sales of less than \$12,500 in preceding quarter year.

Sec. 1395.20. Appendix C: Form OPA 677:115b
—Application for adjustment of maximum prices of an individual casting or a group of castings sold at the same price.

Sec. 1395.21. Appendix D: Form OPA 677:115c
—Buyer's report on above application.

Sec. 1395.22. Appendix E: Form OPA 677:115d
—Application for adjustment of maximum prices of all castings.

Sec. 1395.23. Appendix F: Form OPA 677:115e
—Buyer's report on above application.

Authority: §§ 1395.1 to 1395.23, inclusive, issued under Pub. Laws 421 and 729, 77th Cong. and E.O. 9250, 7 F.R. 7871.

§1395.1. Exclusions. (a) This regulation shall not apply to sales or deliveries of nonferrous castings if, before February 1, 1943, such casting have been received by a carrier, other than a carrier owned or controlled by the seller, for shipment to the buyer.

(b) Nothing in this regulation or in the General Maximum Price Regulation³ shall apply to any sale,

³⁷ F.R. 3153, 3330, 3666, 3990, 3991, 4339, 4487, 4659, 4738, 5027, 5276, 5192, 5365, 5445, 5565, 5484, 5775, 5784, 5783, 6058, 6081, 6007, 6216, 6615, 6939, 6794, 7093, 7322, 7454, 7758, 7913, 8431, 8881, 9004, 8942, 9435, 9615, 9616, 9732, 10155, 10454; 8 F.R. 371.

contract to sell, or delivery of nonferrous castings by any person whose total sales of nonferrous castings were less than \$12,500 for the preceding three months period ending on the last day of December, March, June or September, as the case may be, (here called "calendar quarter year") except that a report shall be filed with the Office of Price Administration at Washington, D. C., by the seller on Form OPA-677:115a (set forth as § 1395.19 of this regulation) on the twentieth day of January, April, July and October of each year, stating (1) total dollar net sales, with the best available estimate of net sales of nonferrous castings covered by this regulation, in dollars and pounds, for the preceding calendar quarter year and (2) number of employees in the foundry for the last week of the preceding calendar quarter year.

(c) This regulation shall not apply to sales, contracts to sell or deliveries of:

(1) Products listed in Appendix A, § 1499.166 of Maximum Price Regulation No. 188, as amended,⁴ or

(2) Products covered by Maximum Price Regulation No. 261⁵ as defined in subparagraph (2), § 1346.215 of that regulation, or

(3) Type used for printing, or

(4) Nonferrous castings machined to such extent that the cost of machining (all price elements other than profit) is more than 25% of the total

⁴⁷ F.R. 5872, 8943, 8948, 10155, 8 F.R. 537.

⁵⁷ F.R. 9187.

cost (all price elements other than profit) of the rough casting plus the cost of machining, when (i) the castings are subject to a price regulation other than the General Maximum Price Regulation, and/or (ii) the castings are sold by a person who does not produce the rough casting and who, further, is not a subsidiary or affiliate of the producer of the rough casting, or

(5) Nonferrous castings machined to such extent that cost of machining is more than 50% of the total cost, as provided in the preceding subparagraph (4) where the casting is a component part or subassembly of (i) aircraft, ammunition, armored trains, artillery, balloon barrage equipment, bombs, bomb sights, caissons, fire control equipment, gas masks, grenades, gun sights, military bridges, mines, mortars, projectiles, pyrotechnics, small arms, ships and boats and torpedoes; and (ii) amphibians, armored vehicles, automobiles, tanks, trailers and trucks, for military purposes, sold, contracted to be sold or delivered to the United States or any agency thereof, or to the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled "An Act to promote the defense of the United States," or any agency of any such government. The term "component parts and subassemblies" includes all metallic and nonmetallic component parts, adjuncts, and accessories which have been machined or fabricated. The term does not include raw or unfinished materials

or any other materials which are in such form as to permit their use in the manufacture of products other than those set forth in this subparagraph, or

(6) Bushings and bearings machined to such extent that the cost of machining is more than 25% of the total cost, as provided in the preceding subparagraph (4), irrespective of whether such bushings and bearings are subject to a price regulation other than the General Maximum Price Regulation. Where percentage of machining cost is referred to in this or the preceding subparagraphs (4) and (5) and a toll or conversion agreement is involved in which the seller does not buy or sell the material used for the casting, the metal cost shall nevertheless be included at current maximum prices in figuring whether the 25% or 50% has been exceeded, or

(7) Finished replacement parts sold as finished replacement parts by a person who does not produce the parts, or who further, is not a subsidiary or affiliate of the producer of the parts.

1395.2. Prohibition against sales of nonferrous castings at prices higher than maximum prices. On and after February 1, 1943, regardless of any contract, agreement or other obligation:

(a) No person shall sell or deliver any nonferrous casting at a price higher than the maximum price established by this regulation. (See §1395.15 (a) for what is meant by a "person" and a "nonferrous casting" under this regulation.)

(b) No person in the course of trade or business shall buy or receive any nonferrous casting at

a price higher than the maximum price. However, if the buyer obtains from the seller a written statement sworn to by the seller or a responsible official of the seller, that to the best of the seller's knowledge, information and belief, the price charged is not higher than the maximum price established by this regulation, and if in such case the buyer has no knowledge of the maximum price and no reason to doubt the accuracy of the statement, the buyer will be considered to have complied with this paragraph. Further, the buyer will be considered to have obtained this statement if:

(1) He obtains a letter or other written statement to the buyer sworn to by the seller or a responsible official of the seller, to the effect that the prices on all invoices to be issued will not be higher than the applicable maximum prices established by this regulation and that the seller's methods of figuring prices has been so established as to achieve this result, and

(2) The seller stamps an appropriate statement on each invoice or bill.

(c) No person shall agree, offer, solicit, or attempt to do any of the acts prohibited in paragraphs (a) or (b) of this section.

(d) Where the contract of sale has been entered into before February 1, 1943, the parties to the contract, until March 1, 1943, may make and accept deliveries of the castings required or specified in the contract and the seller may render bills or invoices for the castings to the buyer at the contract price, but the price shall be adjusted in accordance with

the maximum prices established by this regulation within a period not to exceed 30 days after the billing or invoicing.

§ 1395.3. Maximum prices and report requirements for nonferrous castings sold or delivered on or after February 1, 1943—Castings the same, or of the same class, as those sold or contracted to be sold by the seller during the period from October 1 to October 15, 1941, inclusive, or sold, contracted to be sold or delivered by the seller during the period from May 11, 1942 (the effective date of Maximum Price Regulation No. 125) to January 31, 1943, inclusive.

(See § 1395.15 (a) (4) for what is meant by “the same class” of castings). The maximum price shall be figured as follows:

(a) First, take as the base the most recent net price at which the seller sold or contracted to sell the castings or class of castings (if the most recent price was established during October 1 to October 15, 1941, inclusive) or sold, contracted to sell or delivered the castings or class of castings (if the most recent price was established during May 11, 1942, to January 31, 1943, inclusive). “Net price” here means the price after the seller’s usual adjustment for rate of delivery, extra charges, cash discounts or other allowances.

(1) If the sale or delivery is to the same buyer who bought or contracted to buy the casting or a casting of the same class between October 1 to October 15, 1941, inclusive, or who bought, con-

tracted to buy or obtained delivery of the casting or castings of the same class between May 11, 1942, and January 31, 1943, inclusive, then the base price must be the most recent net price to that specific buyer, rather than the most recent net price to any other buyer of the same casting or casting of the same class.

(2) This base price must be a price which fully meets the requirements of Maximum Price Regulation No. 125 as in effect at the time of the sale, contract to sell or delivery, as the case may be. For convenience in checking the requirements, there is included in this regulation, as § 1395.18, a statement of the maximum prices in effect before February 1, 1943. If the most recent price was not figured as required at the time by Maximum Price Regulation No. 125, the price shall be corrected to arrive at the proper base price.

(b) Second, reduce the base price by the amounts stated below:

Reductions Per Pound (Cents)

(1) If the casting is made from copper or copper base alloys, $1\frac{1}{2}$.

(2) If the casting is made from aluminum or aluminum base alloys, 3.

(3) If the casting is made from magnesium or magnesium base alloys, 3.

However, if the base price already reflects reductions made because of reductions in the maximum prices of metals or alloys since September 30, 1941, and full showing is first made to the Office of Price

Administration at Washington, D. C., of that fact, the above specified reductions need only be made to the extent that the previous reductions are less than the amounts set forth above. The showing may be made by letter, or the Office of Price Administration may provide a form for the purpose. Unless and until the above showing is disapproved, the reductions need not be made. However, in the event of disapproval and within ten days after the disapproval, refund must be made of the amount of the reductions. In the case of a "toll," "conversion," or "service" agreement, in which the metal or part of the metal for the casting is required to be sold or otherwise furnished to the seller by the buyer or any person on the buyer's behalf, the reductions under subparagraphs (1), (2) and (3) above need only be made to the extent of metal furnished by the seller.

(c) Third, if, after January 31, 1943, a change in alloy between types within one of the groups of alloys listed below is imposed either by the buyer or by order of a government agency then the difference in price of metal as of the date of re-pricing, plus thirty per cent of the amount of such difference, shall be deducted from or added (as the case may be) to the base price of the casting to arrive at the maximum price per pound in accordance with paragraphs (a) and (b) above.

Copper base alloys. (Numbers refer to numbers used in Maximum Price Regulation No. 202,⁶ § 1309.165.)

⁶7 F.R. 6421, 7247, 8948, 9427.

Group No. 1—85-5-5-5 or 88-10-2 Groups, (OPA Nos. 100-256, inclusive, and similar alloys).

Group No. 2—80-10-10 Group, (OPA Nos. 295-326, inclusive, and similar alloys).

Group No. 3—Yellow Brass Group, (OPA Nos. 400-409, inclusive, and similar alloys).

Group No. 4—Nickel Alloys Group, (OPA Nos. 410-414, inclusive, and similar alloys).

Group No. 5—Aluminum Bronze Group, (OPA No. 415 and similar alloys).

Group No. 6—Manganese Bronze Group, (OPA Nos. 420-424, inclusive, and similar alloys).

Group No. 7—Silicon Bronze Group, (OPA No. 500 and similar alloys).

Aluminum base alloys. (Numbers are those used in customary trade practice.)

Group No. 1—8% Copper Group, (Nos. 12, 112 and similar alloys).

Group No. 2—4% Copper Group, (No. 195, and similar alloys).

Group No. 3—Copper Silicon Group, (No. 108, and similar alloys).

Group No. 4—Copper Silicon Magnesium Group, (Nos. 355, 356, and similar alloys).

Group No. 5—Copper Nickel Magnesium Group, (No. 132, 142 (Y alloys) and similar alloys).

Group No. 6—5-13% Silicon Group, (No. 43, 47 and similar alloys).

Group No. 7—4-12% Magnesium Group, (No. 214, 218, 220, and similar alloys).

§ 1395.4. Maximum prices and report require-

ments for nonferrous castings sold or delivered on or after February 1, 1943—Castings of a class different from any casting sold or contracted to be sold by the seller during the period from October 1 to October 15, 1941, inclusive, and different from any casting sold, contracted to be sold or delivered by the seller during the period from May 11, 1942, to January 31, 1943, inclusive—(a) How maximum price is figured on the first sale, contract to sell or delivery of each such casting on or after February 1, 1943. The maximum price for such castings shall be a net price (after the seller's usual adjustment for rate of delivery, extra charges, cash discounts or other allowances) not higher than that figured by using the pricing formulas or methods of figuring the price that were used on October 15, 1941, by the seller, or if the formulas were not used on that date, then the formulas used on the most recent date before October 15, 1941, on which the formulas were used. If the seller was not in business on or before October 15, 1941, and is not a transferee under § 1395.6 of this regulation, or if for any other reason the seller had no formula, or is unable to reduce it to writing or formulate it as required in this regulation, then the seller shall prepare a formula and proceed with filing and obtaining approval as generally required under paragraph (c) of this section. The pricing formula shall be applied, in figuring the maximum price of each casting, as follows:

- (1) Direct labor cost. To the extent that the

seller's pricing formulas include or are based on direct labor costs, the seller shall use labor costs figured and applied as follows:

(i) The seller shall use no more than the identical straight time and overtime labor rates used in his pricing formula on October 15, 1941, for each class of labor. Examples of classes of labor are molders, coremakers, or cleaners.

(ii) If the seller employs labor of a particular class not employed in the foundry on October 15, 1941, the seller shall apply no more than the straight time and overtime rates prevailing on that date for that class of labor in the locality in which the casting is produced.

(iii) If, on October 15, 1941, machine hour, piece or average rates were used, no more than the identical machine hour, piece or average rates must be used; for example, if the rate was \$1.00 per hour on a standard squeezer machine, then that rate must be used now.

(iv) In deciding whether items of labor cost are direct or indirect, the seller shall employ the same classes and considerations that he used on October 15, 1941. For example, if the seller treated cleaning labor as indirect labor on October 15, 1941, he must treat it as indirect labor for this figuring of the price.

(v) The labor rates as limited by the preceding subdivisions (i) to (iv) shall be applied to the number of hours estimated to be required on the basis of previous production experience.

(2) Cost of metals. To the extent that the pricing formulas include, or are based on prices paid for metals the seller shall apply no more than the current metal prices, not in excess of the current maximum prices established by the Office of Price Administration) for the metal used in the casting being priced to the quantities of metals estimated to be required on the basis of previous production experience.

(3) Overhead (burden) rates. To the extent that the pricing formulas include overhead or burden, the seller shall use no overhead or burden higher than that used in his pricing formulas on October 15, 1941, applied in the identical manner that he used on that date. For example, if the seller used 2c per pound for overhead on October 15, 1941, he shall use no more than 2c per pound today; or if the seller added 50% to direct labor for burden on October 15, 1941, he shall add no more than 50% to direct labor for burden today.

(4) Other factors. To the extent that the pricing formulas include or are based on other elements or costs, the seller shall use the same elements or costs in effect on October 15, 1941, applied in the same manner as applied on that date, except that the seller may use additional or different elements or costs or applications thereof so long as a higher price does not result.

(5) Mark-up, margin or profit. The seller shall use no more than the mark-up, margin, or profit which he used on October 15, 1941, applied in the identical manner which he used on that date. For

example, if the seller added to total costs 2c per pound for profit on October 15, 1941, he shall add no more than 2c per pound today; if the seller added 6% to total costs on October 15, 1941, for profit, he shall add no more than 6% to total costs for profit today.

(b) Subsequent sales, contracts to sell, or deliveries of such castings or castings of the same class. The price at which the first sale, contract to sell or delivery is made shall be the seller's maximum price for all subsequent sales, contracts to sell or deliveries of the same casting or casting of the same class, except that:

(1) If the price was in excess of the maximum price permitted under this regulation, the price shall be reduced to arrive at the proper maximum price.

(2) The seller may re-figure the maximum price for clerical errors but only upon first making proper showing by letter or other writing, of the details of such errors to the Office of Price Administration at Washington, D. C., and obtaining approval of the corrections from that Office; and

(3) Adjustment shall be made for changes in alloy as set forth in § 1395.3 (c) of this regulation.

(c) Filing and approval of pricing formulas and prices. (1) Each person selling nonferrous castings on or after February 1, 1943, shall, (to the extent he has not already done so) file, on or before March 1, 1943, with the Office of Price Administration at Washington, D. C., his pricing formulas or methods of calculating price. These formulas

or methods shall be in such detail as is satisfactory to the Office of Price Administration. The formulas must conform exactly to the seller's practice on October 15, 1941, or on the most recent date before October 15, 1941, on which the formulas were used. If the seller was not in business on or before October 15, 1941, and is not a transferee under § 1395.6 of this regulation, or if for any other reason the seller had no formula or is unable to reduce the formula to writing or formulate it as required by this regulation, then the formula to be filed shall be the formula that, in the opinion of the Office of Price Administration, would have been used on October 15, 1941, had the seller conducted business on that date. The formulas must, further, be in such detail that if the Office of Price Administration is furnished the factors peculiar to the individual casting (such as the time required for the different kinds of labor, the alloy, the quantity ordered, etc.), the Office can arrive at the same maximum price as the seller.

(2) The factors to be included in the formulas may include those listed below and such other factors as were employed. The factors may be included singly, or several factors may be combined if that was the seller's practice; for example, it may have been the seller's practice in some cases to figure all factors except metal cost at a flat amount per pound or per day. As further examples, the seller may have figured all burden and overhead at a flat amount per pound or as a single percentage of all direct labor combined, or as a single per-

centage of the direct molding labor. If different combinations are used in figuring prices of different alloys or of different types of castings, all the combinations should be listed with an explanation of how and when they are applied. It is essential that every factor or every combination of factors which was used by the seller in establishing the price for any casting, be stated exactly:

(i) Metal costs—(a) Price of the metal. The formula should specify whether purchase price, delivered price, or delivered price plus handling charges was used.

(b) Metal loss. This can be stated as an allowance in cents per pound or percentage for each alloy separately, or as an average, if an average was used.

(c) Melting cost. The particular allowance shall be given for each alloy, or the average if an average allowance was used.

(d) Yield. If this factor was used, an explanation should be given of how it was employed.

(ii) Direct labor. State for each class, such as molders, coremakers, cleaners, inspectors, machine operators, etc.

(a) Wage rates. Give standard and overtime separately; state the average rate, if an average was used, or all individual rates within each class, with the type of casting or production to which each rate applied.

(b) Burden. State in percentage of labor costs or cents per pound or per machine hour; if an av-

erage rate was used, it should be so stated; if individual rates were used, the type of casting or production to which applied should be stated.

(iii) Defectives. State the individual allowances, with method of application and group to which it applied; if average allowance was used, that average should be stated.

(iv) Shop overhead. Furnish this item, if used separately from burden (ii) (b) or to cover burden or burden and direct labor or total foundry cost up to this point: state flat amounts in cents per pound, dollar per hour, or dollar per day or percentage, and where applied.

(v) Administrative and selling overhead if used separately from burden (ii) (b) and shop overhead (iv). State percentage or flat amount and where applied.

(vi) Other costs. For example, amount charged for heat treating, X-rays, delivery, etc. These should be specified and a statement included as to how and where applied.

(vii) Adjustments for rate of delivery, extra charges, cash discounts or other allowances.

(viii) Rate of profit. State the flat amount or percentage and how applied.

(3) If a seller commenced sales of nonferrous castings on or after February 1, 1943, he shall file a report similar to the report required by the preceding subparagraph (1) of this paragraph (c) within 30 days after his first quotation of prices.

(4) When a formula is filed and rates are re-

ported by a seller who was not in business on or before October 15, 1941, and who is not a transferee under § 1395.6 below, or by any other person who had no formula on or before October 15, 1941, or who is unable to reduce his formula to writing in a manner that clearly describes the method of pricing to the satisfaction of the Office of Price Administration, prices calculated in accordance with the formula and rates may be quoted or charged unless and until the Office of Price Administration disapproves the formula or rates or requires a new filing of formula or rates.

(5) The Office of Price Administration may disapprove, in writing, the formula filed or the rates reported in the cases mentioned in subparagraph (4) above, and the prices resulting from their use. Upon such disapproval the seller shall file a revised formula or rates in accordance with directions which the Office of Price Administration shall state at the time of the disapproval. In disapproving any proposed formula or rates, the Office of Price Administration may require refunds on all deliveries made at prices calculated by the use of the formula or rates. The disapproval of the formula or rates, or the requirement of refunds shall, upon request of the seller, be embodied in an order.

§ 1395.5 Developmental contract and subcontract.

(a) No developmental contract or subcontract shall be exempt from any provisions of this regulation except upon full compliance with the provisions of, and to the extent provided in, this paragraph. For

the purposes of this paragraph a contract or subcontract is considered to be "developmental" only during the period required for the selection of a suitable casting by the buyer or for the accumulation of sufficient production experience by the seller to permit a fair estimate of the manufacturing costs, or both.

(b) The contract or subcontract must be certified in writing to the Office of Price Administration at Washington, D. C., by the United States or an agency thereof or by the buyer and seller, as being developmental, and a report must be filed as required in paragraph (d) of this section. This regulation shall not apply to any nonferrous casting produced pursuant to such contract or subcontract.

(c) After the Office of Price Administration has determined, upon consultation or communication with the appropriate government agency or with the buyer or seller, that the period necessary for development has expired, and has in writing so notified such agency or the buyer and seller, as the case may be, this regulation shall apply to all subsequent sales and deliveries of the nonferrous castings.

(d) Within ten days after entering into any developmental contract or subcontract, the seller shall file a report, verified by the buyer, with the Office of Price Administration at Washington, D. C., containing a description of the nonferrous casting to be manufactured, a summary of the terms of the contract or subcontract, including all pricing

provisions, a short statement of the production plans of which the contract is a part and an estimate of the expected duration of such developmental work. For any such contract or subcontract in effect on February 1, 1943, the report shall be filed before February 20, 1943. This paragraph is subject to the exception, however, that in the case of a contract or subcontract classified as "secret" and certified as a "secret" contract to the Office of Price Administration by the United States or any agency thereof, or by the government of any country whose defense the President deems vital to the defense of the United States under the terms of the Act of March 11, 1941, entitled "An Act to promote the defense of the United States" or any agency of any such government, there need be reported only that portion of the required information, if any, that is not classified "secret".

(e) No contract based on cost plus a percentage of cost, or cost plus a fixed fee, which results in a price higher than the applicable maximum price, is permitted under this regulation unless the contract qualifies as a developmental contract under the provisions of this § 1395.5. For example, the first sale or delivery of a casting under a cost-plus contract other than a developmental contract, where the maximum price for the casting is established by § 1395.4(a), will fix the maximum price for all subsequent sales, contracts to sell or deliveries of the casting, even though the cost-plus contract provides for a series of transactions.

§ 1395.6 Transfer of business or stock in trade. If the business, assets or stock in trade of any business dealing in nonferrous castings were or are sold or otherwise transferred after October 15, 1941, and the transferee carries on the business, or continues to deal in nonferrous castings in the same competitive area and in an establishment separate from any other establishment previously owned or operated by the transferee, the transferee shall be subject to the same maximum prices as those to which the transferor would have been subject if no such transfer had taken place, and the transferee's obligation to keep records sufficient to verify such prices shall be the same as that of the transferor. The transferor in such cases shall either preserve and make available, or turn over to the transferee all records of transactions that are necessary to enable the transferee to comply with the provisions of this regulation.

§ 1395.7 Less than maximum prices. Lower prices than those provided in this regulation may be charged, demanded, paid or offered.

§ 1395.8 Export sales. The maximum price at which a person may export a nonferrous casting shall be figured in accordance with the provisions of the Revised Maximum Export Price Regulation⁷ issued by the Office of Price Administration.

§ 1395.9 Federal and state taxes. Any tax upon or incident to the sale, delivery, processing or use of a nonferrous casting, imposed by any statute of the

⁷ F.R. 5059, 7242, 8829, 9000, 10530.

United States or any statute or ordinance of any state or subdivision thereof, shall be treated as follows in figuring the seller's maximum price for such casting, except that the tax on the transportation of all property (excepting coal) imposed by section 620 of the Revenue Act of 1942, shall, for purposes of figuring the applicable maximum price, be treated as though it were an increase of 3% in the amount charged by every person engaged in the business of transporting property for hire:

(a) As to a tax in effect between October 1 to October 15, 1941, inclusive or between May 11, 1942 to January 31, 1943, inclusive. (1) If the seller paid the tax, or if the tax was paid by any prior seller irrespective of whether the amount was separately stated and collected from the seller, but the seller did not customarily state and collect separately from the purchase price during the period from October 1 to October 15, 1941, inclusive or between May 11, 1942, to January 31, 1943, inclusive, the amount of the tax paid by him or tax reimbursement collected from him by his seller, the seller may not collect such amount in addition to the maximum price, and in such case shall include such amount in figuring the maximum price under this regulation.

(2) In all other cases if, at the time the seller figures his maximum price, the statute or ordinance imposing such tax does not prohibit the seller from stating and collecting the tax separately from the purchase price, and the seller does state it sepa-

rately, the seller may collect, in addition to the maximum price, the amount of the tax actually paid by him or an amount equal to the amount of tax paid by any prior seller and separately stated and collected from the seller by the seller from whom he purchased, and in such case the seller shall not include such amount in figuring the maximum price under this regulation.

(b) As to a tax or increase in a tax which becomes effective on or after February 1, 1943. If the statute or ordinance imposing the tax or increase does not prohibit the seller from stating and collecting the tax or increase separately from the purchase price, and the seller does separately state it, the seller may collect, in addition to the maximum price, the amount of the tax or increase actually paid by him or an amount equal to the amount of tax paid by any prior seller and separately stated and collected from the seller by the seller from whom he purchased.

§ 1395.10 Adjustable pricing. It is permitted under this regulation to provide in a contract that the price shall be adjustable to a price not higher than the maximum price in effect at the time of delivery.

§ 1395.11 Prohibited evasion practices—(a) General. Any practice which is a device to obtain the effect of a higher-than-ceiling price without actually raising the price is as much a violation of this regulation as an outright over-ceiling price. This applies to devices making use of commissions, serv-

ices, transportation arrangements, premiums, special privileges, tying-agreements, trade understandings, and the like.

(b) Specific practices. The following are among the specific practices prohibited:

(1) Obtaining the effect of a higher price by changing credit practices or cash discounts from what they were during the base period or on the base date. This includes reducing the cash discount period, decreasing credit periods, or making greater charges for extension of credit.

(2) Obtaining the effect of a higher price by refusing to sell on a delivered basis and insisting on selling on an f.o.b. shipping point basis, or vice versa.

(3) Quoting a gross price above the maximum price even if accompanied by a discount the effect of which is to bring the net price below the maximum price.

(4) Obtaining the effect of a higher price by making minor changes in castings having established prices; by requiring a buyer to furnish material for processing not in accordance with previous practice; by entering into a joint venture with any other person subject to this Regulation, for cross-selling or cross-purchasing; by reducing the period of any guaranty or warranty; by undervaluing commodities received in connection with the sale; by distorting estimates of time, material, defectives or other factors in figuring a price; or by making any other change in terms or conditions of sale or contract.

§ 1395.12 Applications for adjustment and petitions for amendment—(a) Applications for adjustment—(1) When available. The Office of Price Administration may by order adjust any maximum price established by this regulation, whenever it finds, from an application for adjustment or on its own motion, that the price impedes or threatens to impede production of one or more nonferrous castings:

(i) The production of which, in the opinion of the Office of Price Administration, aids directly in the war program or is necessary to a standard of living consistent with the prosecution of the war, both because of (a) the type of casting produced, and (b) the necessity of continued production of the casting by the particular seller, or

(ii) The maximum prices of which, after adjustment, are as low as, or lower than, the prices which buyers would be required to pay to the seller's competitors if the seller ceased to produce the castings. Note, however, that not only the conditions of either this subdivision (ii) or the preceding subdivision (i) must be met; those of the following subparagraphs commencing with subparagraph (2) must also be met.

(2) Principal consideration. In deciding whether production is impeded or threatens to be impeded, principal consideration will be given to the overall profit or loss of the seller before income and excess profits taxes. Wherever possible, this consideration will be based on the seller's future annual

earnings (here called "projected profit") as estimated by the Office of Price Administration on the basis of the actual current earnings. The projected profit will be compared with the seller's average profit or loss for his fiscal years beginning between January 1, 1936 and December 31, 1939, adjusted for changes in invested capital. This average will be used as the base profit, except in those instances where the seller was not in business during a part or all of the base period, or where the average is lower than the earnings which the Office of Price Administration considers adequate for foundries of comparable size, in either of which cases a base profit which the Office of Price Administration considers adequate will be used.

(3) Other considerations. The relation of projected profit to base profit will be the principal consideration in determining whether production is impeded or threatens to be impeded, but other factors may be taken into consideration where relevant.

(4) Amounts of adjustment. Increases in price may be permitted in an amount considered sufficient by the Office of Price Administration to avoid the impeding of the production, or the threat to it.

(5) Prices pending disposition of application. Upon the filing of an application for adjustment or within five days prior thereto, and until final disposition of the application, contracts may be entered into or proposed and deliveries made at the prices requested in the application, except that the seller may not receive and the buyer may not pay the

amount by which the price exceeds the maximum price until an order granting the requested adjustment has been issued. Any sale, contract to sell or offer to sell at the price requested in an application shall include the following:

(i) The maximum price established for the casting in question.

(ii) A statement that the quoted price is subject to approval by the Office of Price Administration.

(iii) A statement that an appropriate application has been filed or will be filed within five days with the Office of Price Administration.

(6) Form of application. An application for adjustment shall be made on the applicable Forms OPA 677:115b and 677:115c or OPA 677:115d and 677:115e, as the case may be, set forth as §§ 1395.20 to 1395.23, inclusive, of this regulation. Such forms may be obtained from any regional office of the Office of Price Administration or may be copied by the applicant from this regulation. Every application for adjustment shall contain a statement, signed by the seller, that the statements made in the application are known by the seller or a duly authorized officer or partner of the seller to be true and complete.

(7) Place for filing application and number of copies. An original and one copy of an application for adjustment must be filed with the Office of Price Administration, Washington, D. C.

(8) Supplementary Order No. 9⁸ and Procedural

⁸F.R. 5444, 9323.

Regulation No. 6⁹ not to apply. Supplementary Order No. 9 issued by the Office of Price Administration dealing with applications for adjustment under Procedural Regulation No. 6, of maximum prices of sales pursuant to Government contracts or subcontracts shall not apply to applications for the adjustment of the maximum price of a nonferrous casting.

(b) Petitions for amendment. Any person seeking an amendment of any provision of this regulation may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1 issued by the Office of Price Administration.

§ 1395.13 Records and reports. (a) Every person making a sale of nonferrous castings or a purchase in the course of trade or business shall keep available for inspection by representatives of the Office of Price Administration for so long as the Emergency Price Control Act, as amended, or any applicable part, amendment or supplement remains in effect:

(1) Complete and accurate records of each sale, showing (i) the date of the sale, (ii) the name and address of the other party to the sale, (iii) the net price received or paid after adjustment for all extra charges, discounts, or other allowances, (iv) the quantity and description of each type of nonferrous casting sold, and (v) in the case of the seller, a summary of the calculations made in figuring the

⁹7 F.R. 5087, 5664.

price charged (the summary of calculations may, when necessary, cover groups of castings sold at the same price); and

(2) All available records concerning sales and production, including costs, for the period after October 1, 1940.

(b) Such persons shall keep such other records and submit such other reports to the Office of Price Administration as the Office of Price Administration may from time to time require or permit, either in addition to or in substitution for records and reports required by this regulation.

§ 1395.14 Enforcement. (a) Persons violating any provisions of this regulation are subject to the criminal penalties, civil enforcement actions and suits for treble damages provided for by the Emergency Price Control Act of 1942, as amended.

(b) Persons who have evidence of any violation of this regulation or any price schedule, regulation or order issued by the Office of Price Administration, or of any acts or practices which constitute such a violation, are urged to communicate with the nearest district, state or regional office of the Office of Price Administration or its principal office in Washington, D. C.

§ 1395.15 Definitions. (a) When used in this regulation the term:

(1) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons or legal successor or representative of any of the foregoing, and includes the

United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

(2) "Nonferrous castings" include all rough and machined castings poured from metal at less than seventy-five pounds of pressure per square inch in any type of mold, (as for example, molds of sand, plaster, cement, metal or any other substance) and made from aluminum, antimony, beryllium, bismuth, cadmium, cobalt, copper, lead, magnesium, nickel (other than heat resisting or corrosion resistant alloys to the extent subject to Maximum Price Regulation No. 214¹⁰) tin, zinc, and their alloys where any one or any combination of the above metals equals or exceeds fifty per centum (50%) by weight of the total metal content and where use can be made of the casting without remelting, absorption in a chemical or plating process, extruding, drawing, rolling or forging into another form. The term "nonferrous casting" is also used to include a group of castings sold at the same price.

(3) "Sell or deliver any nonferrous casting" shall include a transaction in which the material for the casting is required to be sold or otherwise furnished to the seller by the buyer or any person on the buyer's behalf. In such case, the "price" under this regulation is the differential above the agreed cost of, or charge for the material, the intent here being to include under this regulation the so-

¹⁰⁷ F.R. 7001, 8948.

called "toll", "conversion" or "service" agreements.

(4) An individual casting is considered to be "of the same class" as another casting unless differences in design or specification, including quantity, imposed by the customer or by order of government agencies result in differences in size, weight, intricacy of design, tolerances, inspection requirements or process of production, involving differences in total cost of manufacture per pound of 5% or more (figured on the basis provided in § 1395.4). A group of castings sold at a flat price is considered to be "of the same class" as another group of castings unless on the average for the group as a whole differences in individual castings or changes in the relative proportions of the individual castings result in differences in weight or size per casting, intricacy of design, tolerances, inspection requirements, or process of production involving differences in total cost of manufacture per pound of the group of castings of 5% or more (figured on the basis provided in § 1395.4). A difference in alloy between the major groups of alloys listed in § 1395.3 (c) shall be considered to be a difference in process, but a difference within any such major group of alloys shall not be so considered, even though involving differences in total cost per pound of 5% or more (figured on the basis provided in § 1395.4).

(5) "This regulation" means this Revised Maximum Price Regulation No. 125.

(b) Unless the context otherwise requires, the

definitions set forth in section 302 of the Emergency Price Control Act of 1942, as amended, shall apply to other terms used herein.

§ 1395.16 Geographical applicability. The provisions of this regulation shall apply to the forty-eight states of the United States and to the District of Columbia.

§ 1395.17 Effective date. This regulation (§§ 1395.1 to 1395.23, inclusive) shall become effective February 1, 1943.

§ 1395.18 Appendix A: Former maximum prices for non-ferrous castings sold during the period May 11, 1942 to February 1, 1943, inclusive—(a) Castings the same or substantially the same as those sold or contracted to be sold to a purchaser of the same class during the period from October 1 to October 15, 1941, inclusive. The applicable maximum price for such castings was the highest net price (after adjustment for all applicable extra charges, quantity discounts, cash discounts or other allowances) at which the seller sold or contracted to sell such castings to a purchaser of the same class during the period from October 1 to October 15, 1941, inclusive.

(b) Castings substantially different from those sold or contracted to be sold during the period from October 1 to October 15, 1941, inclusive, or castings the same or substantially the same as those sold or contracted to be sold during said period, but sold to a purchaser not of the same class. The applicable maximum price for such castings was a net price

(after adjustment for all applicable extra charges, quantity discounts, cash discounts or other allowances) not in excess of that at which the seller would have sold such castings to a purchaser of the same class on October 15, 1941, under the pricing formula or method of calculating price that would have been used by the seller on October 15, 1941, employing the same cost factors (wage rates, prices of materials and overhead) and profit margins which the seller or the seller's transferor would have used on October 15, 1941, even though the seller's cost or profit margins might have increased since that date.

(c) Permission to certain sellers heretofore designated to sell certain castings at prices specified in paragraphs (a) to (k), inclusive of § 1395.2 of Maximum Price Regulation No. 125 (prior to this revision) and entitled "Exceptions" terminate on January 31, 1943. On and after February 1, 1943, such prices may, however, be used as the base price in figuring prices under § 1395.3 (a) of Revised Maximum Price Regulation No. 125.

§ 1395.19. Appendix B:

Budget Bureau Approval No. 08-R299-43.

OFFICE OF PRICE ADMINISTRATION
Washington, D. C.

Non-Ferrous Castings

Form OPA 677:115a

(Specified by Revised Maximum Price Regulation No. 125, § 1395.1 (b)).

Report on net sales for all non-ferrous foundries selling less than \$12,500 of non-ferrous castings in the preceding quarter.

File in the Washington office of OPA by the 20th of January, April, July and October.

Report for quarter ended 194...

Name of company:

Address:

City and State:

Net sales of all products: \$.

Net sales of non-ferrous castings:;
(dollars).

..... (pounds).

Number of employees on pay roll for last week of the quarter:

The statements of fact in this report are known to the undersigned to be true and complete and the estimates given are believed to be correct.

Date:

(Signed)

(Title)

Note: Non-ferrous castings are defined in Revised Maximum Price Regulation No. 125. If the foundry sells other products besides non-ferrous castings, your best estimate of the volume of castings covered by this regulation is acceptable for the purposes of this form.

§ 1395.20 Appendix C:

Budget Bureau Approval No. 08-R290-43.

OFFICE OF PRICE ADMINISTRATION
Washington, D. C.

Non-Ferrous Castings
Form OPA 677:115b

(Specified by Revised Maximum Price Regulation No. 125, § 1395.12 (a) (6)).

Application for adjustment of maximum prices of an individual casting or a group of castings sold at the same price.

If adjustment is requested for all castings, use Form OPA 677:115d.

Note: The term "casting" refers to all castings of a particular design and specifications or a group of dissimilar castings to be sold at the same price per pound.

Fill out two copies of pages one and four for each application and two copies of pages two and three for each casting for which adjustment in price is requested.

Have each customer who buys the castings for which adjustment is sought fill in one copy of form OPA 677:115c and return it directly to the Washington office of OPA.

Name of company

Address

City and State

Type of business organization; Check one: Individual ☐ Partnership ☐ Corporation ☐.

For the definition of non-ferrous castings, see Revised Maximum Price Regulation No. 125.

A. Description of casting for which adjustment is requested:

(a) If this Application covers a group of castings to be sold at the same price per pound, or per piece, attach additional pages giving the following information for each casting in the group.

- (1) Customer
- (2) Address
- (3) Pattern No.
- (4) Description of casting
- (5) End use (W. P. B. definition)
- (6) Priority rating
- (7) Type of pattern
- (8) For how long a time have you made this casting?
- (9) Quantity ordered
- (10) Cores per casting
- (11) Method of molding: () Bench; () Floor;
() Machine; Other(specify).
- (12) Type of mold
- (13) Wt. per casting
- (14) No. per mold
- (15) a. If copper base, nearest OPA Ingot Identification No.
- b. If aluminum, customary trade designation No.
- c. If magnesium, ASTM No.

(b) If the casting was first made prior to February 1, 1943, is the alloy now used the same as that used prior to February 1, 1943? Yes No If the answer is "no," what alloy was used previously? Ingot Identification No. (as above):.....

B. Sales of casting for which adjustment is requested:

(1) Actual net sales of this casting last fiscal year ended.....;; (date) (pounds) (dollars).

(2) Actual net sales of this casting since end of last fiscal year—enter volume of sales at each different price which you charged.

Period covered—From To; Price per pound; Net sales in pounds—a., b., c., d.

(3) Estimated net sales of this casting for remainder of current fiscal year:.....(pounds).

Instructions for C—Reasons for requesting price adjustment.

Item—

(1) a. Column 1: Enter the purchase price used in arriving at your maximum price of one pound of metal. Insert in the note at the bottom of the table the date at which the metal price used actually prevailed in the market.

If the casting was sold or contracted to be sold October 1-15, 1941, or sold contracted to be sold or delivered May 11, 1942 to January 31, 1943, enter the price of the metal you then used in calculating the price of the casting.

If the casting was made prior to February 1, 1943,

and remade on or after February 1, 1943, and the alloy of which the casting was made was changed to another alloy within the same group of alloys as defined in Revised Maximum Price Regulation No. 125, enter the price of the alloy originally used and fill in Question A (b). If the alloy was changed to an alloy in another group, the casting may become a casting of a different class. See Revised Maximum Price Regulation No. 125.

If the casting was first made on or after February 1, 1943, enter the current price of the metal as in Column 2 (see below).

Column 2: Enter current purchase price of one pound of metal. If a composition of various metals or of scrap, virgin and ingot, or any combination thereof is now used, compute the current cost of the actual combination at present prices.

All other items in column 1—costs as of October 15, 1941; column 2—current costs.

(1) b. If you made separate allowance for metal loss on October 15, 1941, include here; otherwise, omit this item and include in melting cost (Item (1) c).

(1) c. Include cost of direct labor, fuel, crucibles, etc., used directly in melting and pouring. If this cost was not segregated on October 15, 1941, include this cost in General Foundry Overhead (Item 6).

(2) a., (3) a., (4) a., and (7) a. State cost of direct or production labor; do not include indirect labor. If wage rates of men actually employed on the job were used in calculating prices

on October 15, 1941, for Column 2 use current wage rates of men now actually employed on the job. If departmental or shop average wage rates were used on October 15, 1941, use department or shop average at current rates for Column 2. Overtime pay may be included in the average in Column 1 only if it was the foundry's practice to include such pay on October 15, 1941, but overtime pay may be included in figures in Column 2 in any case so that the average may reflect current costs accurately. If Item (4) a was not segregated on October 15, 1941, include this cost in General Foundry Overhead (Item 6).

(7) a. (7) b. If you figure machining on a machine-hour basis, combine Items (7) a and b.

(2) b., (3) b., (4) b., (7) b. and (11). Overhead should include indirect labor, incidental materials, and miscellaneous shop expenses. This form provides for the allocation of shop overhead costs on the basis of (A) a percentage of direct labor cost for each department, (B) a percentage of total direct labor costs of the entire foundry, and (C) for companies with accounts for foundry and machine shop combined, for the entire shop. The method which reflects most nearly the established practice of the foundry on October 15, 1941, should be used. If, for example, it was the practice to allocate overhead in whole or in part on the basis of (A), any or all of the items (2) b, (3) b, (4) b, and (7) b should be stated. On the other hand, if it was the practice to allocate all or some of the overhead on

the basis of (B) or (C), Items (6) and (11) should be used.

If you do not allocate overhead on a percentage basis but use a flat rate per hour or per day, cross out the percentage under "Items of Cost." Enter the rates per hour or per day, the poundage to which the rate applies and put the corresponding cost per pound in Columns 1 and 2.

(8) and (9) Include here any other shop costs which you considered separately on October 15, 1941, for example, pattern making, special rigging, special finishing, heat treating, x-raying, etc. Indicate what the items are.

(12) Enter here an allowance for imperfect castings, or indicate where else this item would be figured, as for instance, included in General Foundry Overhead (Item 6).

(14) This item should cover the administrative and selling overhead applicable to the production of non-ferrous castings covered by this Regulation. It should not include any allowance for profit or for income or excess profits taxes.

(15) Include cost of services purchased outside the company, such as pattern making, machining, etc. at their purchase cost plus whatever charges were added on October 15, 1941.

(16) If it was customary to sell at a delivered price on October 15, 1941, include an allowance for delivery charges here, if separately calculated.

(18) Profit at the rate provided on October 15,

1941—Do not include provision for Federal and State income and excess profits taxes.

(20) Column 1 only: If the casting was first made prior to February 1, 1943, enter $11\frac{1}{2}$ cents per pound for copper base alloys, 3 cents per pound for aluminum base alloys, and 3 cents per pound for magnesium base alloys, and subtract these amounts to arrive at the maximum price.

C. Reasons for requesting price adjustment:

In the following form fill in the factors entering into the pricing of the casting for which you are requesting price adjustment. In Column 1 give the cost factors as they are figured under Revised Maximum Price Regulation No. 125, that is, on the basis of costs on October 15, 1941, except for metal cost (see instructions); in Column 2 give the cost factors as you now figure them. Append a detailed explanation of any differences between Columns 1 and 2. If you are now certain that any of your costs will be different during the remainder of the current fiscal year, state these facts and give an estimate of the effect on pricing. If you have firm orders for this casting extending into the next fiscal year, state amount of those orders which will be delivered in the next year.

Read instructions on opposite page before filling in the form.
Pricing Sheet for Casting for Which Adjustment is Requested.
(All figures in cents per pound)

| Items of cost | Column 1 | Column 2 |
|-------------------------------|--|------------------------------|
| | Pricing on basis required by Re- vised MPR 125 | Estimated cur- rent costs |
| (1) Metal: | | |
| a. Purchase price* | | |
| b. Metal loss allowance | | |
| c. Melting cost | | |
| (2) Molding: | | |
| a. Direct labor | | |
| b. Overhead @ % | | |
| (3) Coremaking: | | |
| a. Direct labor | | |
| b. Overhead @ % | | |
| (4) Cleaning: | | |
| a. Direct labor | | |
| b. Overhead @ % | | |
| (5) Total (1 through 4) | | |
| (6) General Foundry | | |
| Overhead @ % | | |
| (7) Machining: | | |
| a. Direct labor | | |
| b. Overhead @ % | | |
| (8) | | |
| (9) | | |
| (10) Total (5 through 9) | | |
| (11) General Manufacturing | | |
| Overhead | | |
| (12) Allowance for Defective | | |
| @ % | | |
| (13) Total Shop Cost | | |
| (10 + 11 + 12) | | |
| (14) Administrative & Selling | | |
| Overhead @ % | | |
| (15) Outside Services | | |
| (16) Delivery | | |
| (17) Total Cost | | |
| (13 + 14 + 15 + 16) | | |
| (18) Profit | | |
| (19) Total (17 + 18) | | |
| (20) Metal Price Adjustment | | x x x x x x x x |
| (21) Price Established by | | |
| Rev. MPR 125 | | x x x x x x x x |
| (22) Price Requested | x x x x x x x x | |

*Date when price for metal quoted in Column 1 actually prevailed
in market

D. Financial data for the company:

If Financial Report Forms A and B have been submitted to OPA by the company for 1941 and any of the quarters of 1942, no information which duplicates material contained in these financial reports need be submitted; but a statement should be attached that, "Financial Report Form A (or B) has been submitted to OPA for [give fiscal period covered]."

(1) If the company sells only non-ferrous castings—

Submit balance sheets and related statements of profit and loss and surplus for each year 1936 through the most recent fiscal year and quarterly reports from the end of the last fiscal year through the most recent accounting period. Income statements should show the following items separately:

(a) net sales of non-ferrous castings in dollars and in pounds.

(b) costs of sales.

(i) wages; (ii) direct metal costs; (iii) other manufacturing costs.

(c) general selling and administrative expenses—State compensation of all officers and directors separately.

(d) amounts charged for depreciation (other than amounts included in (b)), amortization, contingencies and other reserves.

(e) net income before Federal and State income and excess profits taxes.

(f) net income after Federal and State income and excess profits taxes.

(2) If the company sells other products besides non-ferrous castings—

Submit for the periods stated in (1) balance sheets for the company as a whole; and related statements of profit and loss and surplus as follows:

(a) If the accounts are segregated for the foundry alone, give the statements for the foundry, and

(b) if the accounts are not segregated, present the statements for the company as a whole, showing thereon an allocation of the items listed in (1) for the foundry alone with the basis of allocation.

Give in addition the net book value of the plant devoted to foundry operations at each of the indicated periods.

The statements of fact in this report are known to the undersigned to be true and complete, and the estimates given are believed to be correct.

(Applicant)

By (Title).

§ 1395.21 Appendix D:

Budget Bureau Approval No. 08-R291-43.

OFFICE OF PRICE ADMINISTRATION
Washington, D. C.

Non-Ferrous Castings
Form OPA 677:115c

(Specified by Revised Maximum Price Regulation No. 125, § 1395.12 (a) (6)).

For Customers

Fill in the blanks in part (A) and ask each customer affected to answer the questions in part (B) and return the form directly to the Washington office of OPA.

A. The (name of foundry) is requesting a price increase from (....) cents per pound (or piece) to (....) cents per pound (or piece) on castings made from Pattern No.

B. (1) Name of customer

(2) Address of customer

(3) If foundry named in Part (A) stops supplying you, will you be able to secure needed supplies of castings from other foundries? Yes.... No.....

(4) If the answer to (3) is "no," is the reason—

(a) because there are no other foundries in your vicinity ().

(b) foundries in your vicinity do not have capacity to absorb your orders at present ().

(c) no other foundry can develop the necessary skill to make the castings in a reasonable length of time ().

(d) other (explain) .

(5) If the answer to (3) is "yes,"—

(a) Are the requested prices generally higher (), the same () or lower () than those at

which you can get the castings from other foundries?

(b) If the requested prices are higher or lower than those of other foundries, is the difference, 0-5% (), 5-10% (), more than 10% ()?

(Signed)

§ 1395.22 Appendix E:

Budget Bureau Approval No. 08-R292-43.

OFFICE OF PRICE ADMINISTRATION
Washington, D. C.

Non-Ferrous Castings
Form OPA 677:115d

(Specified by Revised Maximum Price Regulation No. 125, § 1395.12 (a) (6)).

Application for adjustment of maximum prices of all castings.

Fill out two copies of each page of this form. Fill in part (A) on six copies of Form OPA 667:115E and ask each of your six largest customers to fill in part (B) of one form and return it directly to this office.

Name of company

Address:

City and State:

Type of business organization; Check one: Individual () Corporation () Partnership ().

A. Amount of price increase requested and customers affected:

(1) State amount of price increase requested: (fill in one) cents per pound or percent of present prices.

(2) Estimated net sales from end of most recent accounting period to end of fiscal year: \$., at present prices. Most recent accounting period ended Fiscal year ends

(3) Attach a list of the names and addresses of your six largest customers.

B. Reasons for requesting price adjustment:

Attach a statement of the reasons for requesting price adjustments. Explain what conditions have arisen with respect to the business which make present prices yield an income inadequate to keep the foundry in business.

C. Financial data for the company:

If Financial Report Forms A and B have been submitted to OPA by the company for 1941 and any of the quarters of 1942, no information which duplicates material contained in these financial reports need be submitted; but a statement should be attached that, "Financial Report Form A (or B) has been submitted to OPA for [give fiscal period covered]."

(1) If the company sells only non-ferrous castings—

Submit balance sheets and related statements of profit and loss and surplus for each year 1936 through the most recent fiscal year and quarterly reports from the end of the last fiscal year through the most recent accounting period. Income state-

ments should show the following items separately:

(a) Net sales of non-ferrous castings in dollars and in pounds.

(b) Costs of sales—(i) Wages; (ii) Direct metal costs; (iii) Other manufacturing costs.

(c) General selling and administrative expenses—State compensation of all officers and directors separately.

(d) Amounts charged for depreciation (other than amounts included in (b)), amortization, contingencies and other reserves.

(e) Net income before Federal and State income and excess profits taxes.

(f) Net income after Federal and State income and excess profits taxes.

(2) If the company sells other products besides non-ferrous castings—

Submit for the period stated in (1) balance sheets for the company as a whole; and related statements of profit and loss and surplus as follows:

(a) If the accounts are segregated for the foundry alone, give the statements for the foundry, and

(b) if the accounts are not segregated, present the statements for the company as a whole, showing thereon an allocation of the items listed in (1) for the foundry alone, with the basis of allocation.

Give in addition the net book value of the plant devoted to foundry operations at each of the indicated periods.

The statements of fact in this report are known

to the undersigned to be true and complete, and the estimates given are believed to be correct.

(Applicant)

By (Title).

§ 1395.23 Appendix F:

Budget Bureau Approval No. 08-R293-43.

Office of Price Administration

Washington, D. C.

Non-Ferrous Castings

Form OPA 677:115e

(Specified by Revised Maximum Price Regulation No. 125, § 1395.12 (a) (6)).

For Customers

Fill in the blanks in part (A) and ask your six largest customers to answer the questions in part (B) and return the form directly to the Washington office of OPA.

A. The (name of foundry) is requesting a price increase of () percent or () cents per pound on all castings.

B. (1) Name of Customer:

(2) Address of Customer:

(3) If foundry named in Part (A) stops supplying you, will you be able to secure needed supplies of castings from other foundries? Yes No

(4) If the answer to (3) is "no," is the reason—

(a) because there are no other foundries in your vicinity ().

(b) foundries in your vicinity do not have capacity to absorb your orders at present ().

(c) no other foundry can develop the necessary skill to make the castings in a reasonable length of time ().

(d) other (explain).

(5) If the answer to (3) is "yes,"—

(a) On the whole are the requested prices higher (), the same () or lower () than those at which you can get the castings from other foundries?

(b) If the requested prices are higher or lower than those of other foundries, is the difference 0-5% (), 5-10% (), more than 10% ()?

(Signed)

Issued this 27th day of January 1943.

PRENTISS M. BROWN,
Administrator.

MPR 125

AMDT. 3

JAN. 13, 1944

JOINT EXHIBIT 5-E

Office of Price Administration

Advance Release: OPA-T-1618

For Morning Papers,

Friday, January 14, 1944.

Amdt. 3 to MPR 125—Non-Ferrous Castings

Press Release

Cleared and issued through facilities of the Office of War Information.

A readjustment in the maximum prices for copper and copper base alloy castings that will restore part or all of the reductions made last February in ceilings for some types of castings was announced today by the Office of Price Administration.

On February 1, 1943, OPA explained, maximum prices for the castings were established generally as the seller's most recent prices in the base pricing periods of October 1-October 15, 1942, or May 11, 1942-January 31, 1943, less 1½ cents per pound. The 1½ cents per pound reduction was provided largely to pass on to buyers of castings the benefit of certain savings generally accruing to the non-ferrous foundry industry through lower raw material costs brought about by other OPA actions.

The new modified reductions were drawn after consultation with the OPA Industry Advisory Committee.

The modified reductions, OPA said, are based upon alloy specifications of castings, and are designed to approximate as closely as is feasible the actual savings to the foundry industry through OPA reductions in the price of raw materials.

The new modified reductions from base period prices, which replace the old flat 1½ cents per pound reductions, are as follows: On 85-5-5-5 or 88-10-2 specification castings, one cent a pound; on 80-10-10 and yellow brass group castings, 1¼ cents a pound, and on the silicon bronze groups, one cent a pound. In the case of 97 per cent copper specification castings, the 1½ cents per pound reduction is completely eliminated.

Copper and copper base alloy castings are used in the construction of ships, engines, tanks, airplanes, munitions, and other war goods, and for many civilian items, including valves.

(Amendment No. 3 to Revised Maximum Price Regulation No. 125—Non-Ferrous Castings. Effective February 1, 1944.)

Regulation

(Document No. 26640)

Part 1395—Nonferrous Foundry Products

[RMPR 125,¹ Amdt. 3]

Nonferrous Castings

A statement of the considerations involved in the issuance of this amendment, issued simultaneously herewith, has been filed with the Division of the Federal Register.*

Section 1395.3 (b) is amended to read as follows:

(b) Second, reduce the base price in accordance with the following provisions of this paragraph (b). The base price to be reduced is the base price established before February 1, 1943; the reductions provided below are to be in place of (not in addition to) the reduction formerly required by this paragraph before the February 1, 1944 amendment of the paragraph.

Example. In the case of an 85-5-5-5 casting a reduction of only 1c per pound is now required. If the base price before February 1, 1943 was 21c per

*Copies may be obtained from the Office of Price Administration.

¹8 F.R. 1271, 2597, 2721.

pound, the price, before the February 1, 1944 amendment, was reduced by this paragraph to 19½c. The reduction now required is not subtracted from the 19½c but from the original 21c, making a present price of 20c.

(1) Amount of reduction. The amount of the reduction, except as provided by the further subdivisions of this paragraph (b), shall be as follows:

(i) If the specification calls for copper base alloy for the casting, the reduction shall be in the amount stated opposite the same specification indicated by OPA number of group below, or if the same specification is not indicated, then in the amount stated opposite the most nearly similar specification so indicated. (The OPA numbers refer to numbers used in Maximum Price Regulation No. 202,⁶ § 1309.165.)

| | Reduction per pound, cents |
|--|-------------------------------|
| (a) 85-5-5-5 or 88-10-2 groups (OPA Nos. 100-256, inclusive) | 1 |
| (b) 80-10-10 group (OPA Nos. 295-326, inclusive) | 1¼ |
| (c) Yellow brass group (OPA Nos. 400-409, inclusive) | 1¼ |
| (d) Silicon bronze group (OPA No. 500) .. | 1 |
| (e) All other copper base alloys (except copper content of 97% or greater) | 1½ |
| (ii) If the copper content specified for the casting is 97% or greater..... | No reduction |

⁶ 7 F.R. 6421, 7247, 8948, 9427; 8 F.R. 1449, 4510.

Cents

(iii) If aluminum or aluminum base alloy is specified for the casting, the reduction shall be 3

(iv) If magnesium or magnesium base alloy is specified for the casting, the reduction shall be 3

(2) Specification is the test. In figuring the reduction under subparagraph (1), the test will be the metal specification for the casting to be priced. The test will not be the individual metal or metals (alloy, virgin or scrap) used in making up the specification.

Example. If the specification calls for 85-5-5-5 the reduction of 1c per pound is required even though the foundry is able to use virgin copper in part, in making the casting to the 85-5-5-5 specification.

The test, also, will be the specification of metal at the time of the pricing involved and not at the time the casting was made for the first time or at any other time in the past.

(3) Previous reduction and showing. If the base price already reflects reductions made because of reductions in the maximum prices of metals or alloys between September 30, 1941 and February 1, 1943, and full showing of the earlier reductions is first made (before collecting of the price) or has been made to the Office of Price Administration at Washington, D. C., the reductions under this paragraph (b) need only be made to the extent

that the previous reductions shows are less than the amounts required. A showing may be made by letter or the Office of Price Administration may provide a form for the purpose. Unless and until a showing is disapproved, the reductions need only be made to the extent that the previous reductions shown are less than the amounts required. However, if the showing is disapproved, refund must be made to the extent that the showing is disapproved, within ten days after the disapproval.

(4) "Toll" transactions. In the case of a "toll," "conversion" or "service" agreement, in which the metal or part of the metal for the castings is required to be sold or otherwise furnished to the seller of the castings by the buyer or by any person on the buyer's behalf, the reductions under this paragraph (b) need only be made to the extent of metal furnished by the seller.

(5) Choice in case of previous special price adjustment. A seller whose maximum prices have been adjusted by special order of the Office of Price Administration before February 1, 1944, is permitted to price castings made from copper or copper base alloys upon the basis of the reduction provided in this paragraph (b), instead of under the maximum prices as adjusted by the special order. However, if it is the seller's choice to price under this paragraph (b), he must make that choice for all his maximum prices and not just for some. If the seller does not make this choice, the seller must:

(i) Continue under the maximum prices provided in the adjustment order and

(ii) Must, in the case of copper and copper base alloy castings that are not covered by the adjustment order, figure his maximum prices on the basis of a reduction of 1½¢ per pound instead of the basis provided in this paragraph (b).

Any seller choosing to change from a basis of pricing under an adjustment order to the basis provided in this paragraph (b) must first send to the Office of Price Administration at Washington, D. C., a letter stating that he chooses to establish his maximum prices on the basis of reductions provided in this paragraph (b). The choice must be made and the letter stating the choice must reach the above office before March 1, 1944. The maximum prices as established under the choice will become effective when the seller receives acknowledgment of the letter from the above office.

This amendment shall become effective February 1, 1944.

Note: All reporting and record-keeping requirements of this regulation have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(56 Stat. 23, 765; Pub. Law 151, 78th Cong.; E.O. 9250, 7 F.R. 7871; E.O. 9328, 8 F.R. 4681)

Issued this 13th day of January 1944.

CHESTER BOWLES,
Administrator.

[Endorsed]: Filed Nov. 29, 1948.

[Title of Tax Court and Cause.]

Held, amount paid in settlement of alleged violation of Maximum Price Regulations of the Office of Price Administration is not an ordinary and necessary business expense of taxpayer's business.

Donald C. McGovern, Esq., for the petitioner.

H. A. Melville, Esq., for the respondent.

MEMORANDUM OPINION

VAN FOSSAN, Judge:

Respondent determined a deficiency in petitioner's income tax liability for the year 1944 in the amount of \$2,911.85. Petitioner alleges (1) that respondent erred in disallowing a deduction as business expense of the sum of \$13,071.08 paid in settlement of alleged violation of Maximum Price Regulations of the Office of Price Administration, and (2) in failing to allow the amount of \$13,071.08 as additional cost of goods sold.

On brief petitioner abandons the second allegation and contends that the payment should be allowed as a reduction or adjustment of sales income.

The case was submitted on stipulation of facts, which we adopt in toto as our findings of fact, the pertinent parts of which are as follows:

Petitioner is a corporation which filed its Federal tax returns for the calendar year 1944 with the collector of internal revenue for the sixth district of California at Los Angeles, California.

Petitioner keeps its books and records and files its Federal tax returns on the accrual basis.

The tax in controversy is income tax for the calendar year 1944 in the amount of \$2,911.85, which represents the deficiency determined by respondent.

During the period involved, petitioner was engaged in the business of making and selling non-ferrous castings of brass and bronze alloy.

Under the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress, 2nd Session), approved January 30, 1942, the Office of Price Administration was empowered to regulate the selling prices of certain products, including non-ferrous castings and the brass and bronze alloy ingots from which said castings are made.

The Office of Price Administration promulgated Price Regulation 202, dated August 13, 1942, effective August 19, 1942, which regulated the selling prices of brass and bronze alloy ingots and provided, in part, as follows:

Sec. 1309.151. On and after August 10, 1942, regardless of any contract * * * no person shall sell * * * at a price higher than the maximum price established * * *.

Said Regulation 202 further provided:

Sec. 1309.165—Appendix A. Maximum prices for brass and bronze alloy ingot. (a) Delivery charges. The maximum prices herein established for brass and bronze alloy ingot include transportation costs to any destination within the continental United States not exceeding 25 cents per hundred weight. Actual transportation costs in excess of

those so included may be charged to, and paid by, the buyer.

A schedule of maximum prices for various classifications of brass and bronze alloy ingots is thereafter set forth in the said Regulation 202.

Petitioner, at all times material hereto, purchased its requirements of brass and bronze alloy ingots from H. Kramer & Co., Chicago, Illinois.

The Office of Price Administration promulgated Revised Maximum Price Regulation 125 (hereinafter referred to as RMPR, 125) dated January 27, 1943, effective February 1, 1943, which established maximum selling prices of non-ferrous foundry products.

Said RMPR 125 reduced petitioner's maximum selling prices one and one-half cents per pound for the castings involved herein effective February 1, 1943. Petitioner was furnished a copy of said RMPR 125 and was aware of its provisions.

Petitioner did not reduce its prices to its customers as required by said RMPR 125.

Two O.P.A. investigators appeared at petitioner's office in the spring of 1944 and examined its books.

As a result of said examination, the O.P.A. alleged that petitioner had violated RMPR 125. In order to settle the O.P.A. claim, the petitioner issued its check, dated July 14, 1944, made payable to the order of the Treasurer of the United States in the amount of \$13,071.08, and was given a receipt therefor reading as follows:

Receipt

Received this 17th day of July, 1944 check No. 3539-E dated 7/14/44 in the sum of \$13,071.08, payable to the Treasurer of United States, from National Brass Works, Inc., of Los Angeles, California, in settlement of the Administrator's Claim for treble damages on account of violations of ceiling prices for non-ferrous castings under RMPR 125.

/s/ WM. H. BUCKINGHAM,
Enforcement Attorney.

In 1944 petitioner accrued on its books said \$13,071.08 as a business expense and deducted said sum in computing its income for Federal income tax purposes. The respondent, in his statutory notice of deficiency, disallowed said deduction with the following explanation:

(a) It is held that an item in the amount of \$13,071.08, representing 'Settlement of administrator's claim for treble damages on account of violation of ceiling prices,' and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23 (a) or (f) of the Internal Revenue Code.

The aforesaid disallowance by respondent gave rise to the instant appeal, and the allowability thereof is the only issue involved herein.

The said \$13,071.08 was based upon sales made by petitioner, at prices in excess of the maximum prices established under RMPR 125, which sales were made during the period February 1, 1943 to

January 31, 1944, to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of section 205 (e) of the Emergency Price Control Act of 1942.

We make the following ultimate findings of fact:

The payment of \$13,071.08 which was made to the O.P.A. in compromise of the Administrator's claim for treble damages was not an ordinary and necessary business expense of the petitioner within the meaning of section 23 (a) (1) (A), I.R.C.

Petitioner concedes on brief that this Court has decided three cases on comparable facts adversely to petitioner's position. These cases are: Scioto Provision Company, 9 T.C. 439; Garibaldi & Cuneo, 9 T.C. 446, and Jerry Rossman Corporation, 10 T.C. 468.

No arguments not heretofore fully considered by the Court in the above cited cases are presented by petitioner's brief. We adhere to the decisions in those cases and hold that respondent did not err in disallowing the claimed business expense.

We see no merit in petitioner's alternate contentions.

Decision will be entered for the respondent.

[Seal]: V.S.T.C.

Entered: Mar. 24, 1949.

Served: Mar. 24, 1949.

Received: Mar. 23, 1949.

The Tax Court of the United States, Washington

Docket No. 13434

NATIONAL BRASS WORKS, INCORPORATED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's determination as set forth in its Memorandum Opinion, entered March 24, 1949, it is

Ordered and Decided: That there is a deficiency in income tax of \$2,911.85 for the year 1944.

/s/ ERNEST VAN FOSSAN,

Judge.

Entered: Mar. 25, 1949.

Served: Mar. 25, 1949.

In the United States Court of Appeals
for the Ninth Circuit

No. 13434

NATIONAL BRASS WORKS, INC.,
Petitioner,

vs.

COMMISSIONER ON INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

I.

Jurisdiction

National Brass Works, Inc., the petitioner on review (hereinafter referred to as Petitioner) respectfully petitions this Honorable Court to review a decision of the Tax Court of the United States, entered March 25, 1949, determining a deficiency in petitioner's income tax for the year 1944 in the amount of \$2,911.85 and respectfully shows:

Petitioner is a California corporation, with its principal office located at 2140 East 25th Street, Los Angeles 11, California.

The Commissioner on review (hereinafter referred to as the respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The corporate income tax return of petitioner for the year 1944 was filed with the United States Collector of Internal Revenue for the Sixth District of California at Los Angeles, the office of said Collector being located within the judicial circuit of the United States Court of Appeals for the Ninth Circuit.

The Commissioner determined a deficiency in income tax for the year 1944 in the sum of \$2,911.85, and on January 21, 1947, sent to the petitioner by registered mail a notice of said deficiency. Thereafter, petitioner filed an appeal from said notice of deficiency with the Tax Court of the United States. On March 24, 1949, the Tax Court promulgated its Findings of Fact and Opinion in said appeal, and on March 25, 1949, entered its final decision in said appeal, whereby said Tax Court ordered and decided that there was a deficiency of \$2,911.85 for the year 1944.

Jurisdiction to review said decision of the Tax Court of the United States arises from Sections 1141 and 1142 of the Internal Revenue Code.

II.

Nature of Controversy

The issue involved in this proceeding is as follows:

Is \$13,071.08 paid in 1944 by petitioner to the Office of Price Administration in settlement of the Administrator's claim for treble damages (under Section 205(e), Emergency Price Control Act of 1942) on account of violations of ceiling prices for

non-ferrous castings under revised maximum price regulation 125: (1) Deductible as a business expense under Section 23(a), Internal Revenue Code, or (2) A reduction or adjustment of sales income?

During the period involved, petitioner was engaged in the business of making and selling non-ferrous castings of brass and bronze alloy.

Under the Emergency Price Control Act of 1942 (Public Law 421-77th Congress, 2nd Session) approved January 30, 1942, the Office of Price Administration was empowered to regulate the selling prices of certain products, including non-ferrous castings and the brass and bronze alloy ingots from which said castings are made.

The Office of Price Administration promulgated Price Regulation 202, dated August 13, 1942, effective August 19, 1942, which regulated the selling prices of brass and bronze alloy ingots and provided, in part, as follows:

“Sec. 1309.151. On and after August 10, 1942, regardless of any contract * * * no person shall sell * * * at a price higher than the maximum price established * * *.”

Said Regulation 202 further provided:

“Sec. 1309.165-Appendix A. Maximum prices for brass and bronze alloy ingot. (a) Delivery charges. The maximum prices herein established for brass and bronze alloy ingot include transportation costs to any destination within the continental United States, not exceeding 25 cents per hundred weight. Actual transportation costs in excess of those so

included may be charged to, and paid by, the buyer.”

A schedule of maximum prices for various classifications of brass and bronze alloy ingots is thereafter set forth in the said Regulation 202.

Petitioner, at all times material hereto, purchased its requirements of brass and bronze alloy ingots from H. Kramer & Co., Chicago, Illinois. The said Regulation 202 reduced Kramer Co.’s prices to petitioner up to one and one-half cents per pound on bronze and brass alloy ingots.

Prior to August 19, 1942, Kramer Co. did not charge transportation costs separately to petitioner. After August 19, 1942, and during the period involved herein Kramer Co. charged transportation costs of three-fourths cent per pound to petitioner and billed these costs separately, making a net reduction in price to petitioner not in excess of three-fourths cent per pound instead of one and one-half cents per pound.

The Office of Price Administration promulgated Revised Maximum Price Regulation 125 (hereinafter referred to as RMPR 125), dated January 27, 1943, effective February 1, 1943, which established maximum selling prices of non-ferrous foundry products.

Said RMPR 125 reduced Petitioner’s maximum selling prices one and one-half cents per pound for the castings involved herein, effective February 1, 1943. Petitioner was furnished a copy of said RMPR 125 and was aware of its provisions.

Petitioner did not reduce its prices to its customers as required by said RMPR 125, because the net reduction in price by Kramer Co. to petitioner was three-fourths cent per pound or less, whereas RMPR required petitioner to reduce its price a full one and one-half cents per pound.

Two O.P.A. investigators appeared at Petitioner's office in the spring of 1944 and examined its books.

As a result of said examination, the O.P.A. alleged that Petitioner had violated RMPR 125. In order to settle the O.P.A. claim, the Petitioner issued its check, dated July 14, 1944, made payable to the order of the Treasurer of the United States in the amount of \$13,071.08, and was given a receipt therefor reading as follows:

“Receipt

Received this 17th day of July, 1944 check No. 3539-E dated 7/14/44 in the sum of \$13,071.08, payable to the Treasurer of United States, from National Brass Works, Inc., of Los Angeles, California, in settlement of the Administrator's Claim for treble damages on account of violations of ceiling prices for non-ferrous castings under RMPR 125.

/s/ WM. H. BUCKINGHAM,
Enforcement Attorney.”

In 1944, Petitioner accrued on its books said \$13,071.08 as a business expense and deducted said sum in computing its income for Federal income tax purposes. The Respondent, in his statutory Notice of Deficiency, disallowed said deduction with the following explanation:

“(a) It is held that an item in the amount of \$13,071.08, representing ‘Settlement of administrator’s claim for treble damages on account of violation of ceiling prices’ and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23(a) or (f) of the Internal Revenue Code.”

The said \$13,071.08 was based upon sales made by Petitioner at prices in excess of the maximum prices established under RMPR 125, which sales were made during the period February 1, 1943, to January 31, 1944, to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205(e) of the Emergency Price Control Act of 1942.

III.

Assignments of Error

Petitioner says that the Tax Court erred in the following respects:

1. In deciding that the payment of \$13,071.08 which was made to the Office of Price Administration in compromise of the administrator’s claim for treble damages was not an ordinary and necessary

business expense of petitioner within the meaning of Section 23(a)(1)(A), Internal Revenue Code, because it was a penalty payment instead of a payment of damages; and

2. In deciding that the payment of \$13,071.08 made to the Office of Price Administration was not a reduction or adjustment of sales income under the Emergency Price Control Act of 1942, as amended. Only the administrator of OPA could make a claim against petitioner for damages on account of the overcharges, and the administrator was the only one with whom petitioner could make an adjustment in its selling prices, because the items involved were sold to customers who bought them for use or consumption in the course of their trade or business within the meaning of Section 205(e) of the Emergency Price Control Act of 1942, as amended.

Wherefore, your Petitioner prays that the decision of the Tax Court of the United States be reviewed by the United States Court of Appeals for the Ninth Circuit, and that a transcript of the record be prepared in accordance with the law and rules of said Court of Appeals and transmitted by the Clerk of the Tax Court to the Clerk of said Court of Appeals for filing, and that appropriate action be taken to the end that the errors complained of be reviewed and corrected by said Court of Appeals.

/s/ DONALD C. McGOVERN,
Attorney for Petitioner
on Review.

VERIFICATION OF PETITION
FOR REVIEW

State of California,
County of Los Angeles—ss.

Donald C. McGovern, being duly sworn, says that he is the attorney for petitioner on review and as such is duly authorized to verify the foregoing petition for review; that he has read the said petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

/s/ DONALD C. McGOVERN.

Subscribed and sworn to before me this 1st day of June, 1949.

[Seal] /s/ PATRICIA P. WHITWORTH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 4, 1949.

Received June 3, 1949.

[Endorsed]: Filed June 3, 1949.

The Tax Court of the United States, Washington
Docket No. 13434

NATIONAL BRASS WORKS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 28, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled: "National Brass Works, Inc., Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 13434, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 15th day of July, 1949.

[Seal] /s/ VICTOR S. MERSCH,

Clerk,

The Tax Court of the
United States.

[Endorsed]: No. 12295. United States Circuit Court of Appeals for the Ninth Circuit. National Brass Works, Inc., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 21, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12295

NATIONAL BRASS WORKS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON WHICH
PETITIONER INTENDS TO RELY

Point I.

The payment of \$13,071.08 by petitioner in 1944 to the Administrator of OPA in settlement of his claim for treble damages on account of overcharges made to customers is not the payment of a penalty, but is an ordinary and necessary business expense

deductible from petitioner's gross income under Section 23(a), Internal Revenue Code.

Point II.

Even if the above payment be considered the payment of a penalty, its allowance as a business expense deduction would not frustrate any sharply defined policies of the Emergency Price Control Act of 1942, under authority of which the Administrator accepted payment to him of the overcharges in settlement of his claim for damages. Therefore, this payment is deductible from petitioner's gross income in 1944 as a business expense under Section 23(a), Internal Revenue Code.

DESIGNATION OF ALL OF THE RECORD WHICH IS MATERIAL TO THE CONSID- ERATION OF THIS REVIEW

The Record which is material to the consideration of this Review and which should be printed is as follows:

Document No. in Tax Court

Clerk's Typewritten

Description

Record on Appeal

| | |
|--|----|
| 1. Names and addresses of attorneys..... | |
| 2. Petition | 2 |
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Dated this 22nd day of June, 1949.

/s/ DONALD C. McGOVERN,
TODD W. JOHNSON,
DONALD C. McGOVERN,
EDWARD D. ROBERTSON,
Attorneys for Petitioner.

State of California,
County of Los Angeles—ss.

Joy Neeleman, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the county of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled action; that affiant's business address is 433 South Spring Street, Los Angeles 13, Calif., that on the 22nd day of July, 1949, affiant served the within Statement of Points and Designation of Record on the Respondent in said action, by placing a true copy thereof in an envelope addressed to the Commissioner of Internal Revenue in care of his attorneys, Theron L. Caudle, Assistant Attorney General, Department of Justice Building, Washington 25, D. C., and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington 25, D. C., and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, Califor-

nia, where is located the office of the attorneys for the persons by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed or there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ JOY NEELEMAN.

Subscribed and sworn to before me this 22nd day of July, 1949.

[Seal] /s/ PATRICIA P. WHITWORTH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Sept. 4, 1949.

[Endorsed]: Filed July 25, 1949.

No. 12295

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL BRASS WORKS, INCORPORATED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

TODD W. JOHNSON,

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No. 12295

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL BRASS WORKS, INCORPORATED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

I.

JURISDICTION.

Under Section 272(a) Internal Revenue Code, respondent, on January 21, 1947, by registered mail, sent a notice of deficiency to petitioner. [R. 8.]

Petitioner, on April 4, 1947, filed its petition with The Court of the United States. [R. 11.] On March 25, 1949, The Tax Court entered its decision that there is a deficiency in income tax of \$2,911.85 for the year 1944. [R. 84.]

Under Sections 1141 and 1142, Internal Revenue Code, petitioner, on June 3, 1949, filed its petition for review [R. 92], and on June 8, 1949, filed its notice to respondent of said filing with this Court because within its circuit is located the Collector's Office at Los Angeles, to which was made the return of tax in respect of which the liability arises. [R. 13.]

II.

STATEMENT OF THE CASE.

Basic Facts.

1. Petitioner makes and sells nonferrous copper base castings in Los Angeles. [R. 13.]

2. Revised Maximum Price Regulation 125, effective February 1, 1943, reduced the price of all petitioner's castings $1\frac{1}{2}$ cents per pound, even on contracts wherein prices were fixed prior to February 1, 1943. [R. 15 and 28.]

3. Petitioner did not reduce its prices. [R. 15.]

4. Amendment #3 to R. M. P. R. 125, effective February 1, 1944, restored $\frac{1}{2}$ cent (on certain specifications) and $\frac{1}{4}$ cent (on other specifications) of the former price reduction on the castings sold by petitioner. [R. 72 and 73.]

5. Two O.P.A. Investigators examined petitioner's books. [R. 15.]

6. The O.P.A. alleged that petitioner had violated R. M. P. R. 125. [R. 15.]

7. Petitioner paid to the O.P.A. Administrator \$13,071.08 in settlement of his claim for treble damages based on overcharges on sales between February 1, 1943, and February 1, 1944. [R. 15 and 16.]

Mitigating Circumstances.

8. Petitioner purchased all its nonferrous ingot metal from H. Kramer & Co., Chicago, Illinois. [R. 14.]

9. On August 19, 1942, Kramer & Co., under M. P. R. 202, reduced the price of nonferrous metal ingots to petitioner $1\frac{1}{2}$ cents per pound on some specifications and $1\frac{1}{4}$ cents per pound on other specifications but charged transportation costs of $\frac{3}{4}$ cent per pound (the excess over $\frac{1}{4}$ cent per pound permitted to be charged by M. P. R. 202), which it had not formerly charged petitioner. [R. 14 and 15.]

10. This resulted in a net reduction in metal ingot cost to petitioner of $\frac{3}{4}$ cent and $\frac{1}{2}$ cent per pound, depending upon the ingot specification. [R. 14 and 15.]

11. The straight $1\frac{1}{2}$ cents price reduction on all copper base nonferrous castings after February 1, 1943, regardless of specifications, was to pass on to consumers the price reduction effective August 18, 1942, by M. P. R. 202 and other O.P.A. orders. [R. 18.]

12. Petitioner, through its president, Mr. Leonard Ruegg, had reduced prices on contracts entered into after February 1, 1943, and had been trying for some time to get price adjustment on contracts entered into prior to February 1, 1943, on account of the inequities of the situation when O.P.A. Investigators appeared at his office. He settled their claim for overcharges by paying the exact amount of the overcharge. These two facts are not proved because Mr. Ruegg died before this case was tried and all O.P.A. records of the Los Angeles office had been destroyed. Petitioner's books and records do not contain evidence of these facts.

III.

SPECIFICATIONS OF ERRORS RELIED UPON.

The Tax Court erred—

1. In deciding that there is a deficiency in petitioner's income tax of \$2,911.85 for the year 1944.

2. In deciding that a payment of \$13,071.08 by petitioner in July, 1944, to the Administrator of O.P.A. in settlement of his claim for treble damages is not an ordinary and necessary business expense, deductible from petitioner's gross income under Section 23(a)(1), Internal Revenue Code, which reads as follows:

“Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses—

(1) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *.”

ARGUMENT OF THE CASE.

POINT I.

The Payment of \$13,071.08 to the Administrator in Settlement of His Claim for Treble Damages on Account of Overcharges Made to Customers Is Not the Payment of a Penalty, but Is a Deductible Business Expense.

In *Jerry Rossman Corporation v. Commissioner of Internal Revenue* (U. S. Court of Appeals, 2d Cir., July 5, 1949), Judge L. Hand, in dealing with the deductibility of a payment to the Administrator in settlement of his claim for treble damages, reversed the Tax Court which had disallowed the deduction. Judge Hand said:

“Hence, we hold erroneous the order assessing the deficiency. First, we say that on no theory was the payment of the overcharge to the United States the payment of a ‘penalty.’ Second, we say that even if it was the payment of a ‘penalty,’ that is not a ‘rigid criterion’ of its deductibility. Third, we say that there was positive and compelling evidence that to allow such a deduction would not frustrate the policies of the underlying act.”

The underlying act was the Emergency Price Control Act of 1942 (Approved 1/30/42) (Pub. Law 421—77th Cong. 2nd Sess.) (56 Stat. 23), hereinafter referred to as E.P.C.A. of 1942.

In the *Jerry Rossman* case, petitioner was a converter of textile products which shrunk in the process of dyeing. In setting the price to customers, O.P.A. permitted petitioner to claim a working allowance shrinkage. Petitioner discovered that it had claimed a shrinkage allowance larger than O.P.A. regulations allowed and, thus, had over-

charged its customers and subjected itself to the Administrator's claim for treble damages. However, before the Administrator made an investigation, petitioner brought the matter to his attention and settled his claim by paying to him the exact amount of the overcharges. Petitioner deducted from gross income the amount of the payment to O.P.A. and the Commissioner disallowed the deduction and was sustained in this disallowance by the Tax Court.

Under Section 205(e) E.P.C.A. of 1942, when prices were charged in excess of the ceilings established by O.P.A. regulations, there immediately arose in favor of the Administrator, or the ultimate consumer, the following claim:

- a. For the amount of overcharges, plus,
- b. Twice the amount of the overcharge, plus,
- c. Attorneys' fees, plus,
- d. Court costs.

Where there was no wilful violation of the ceiling prices, it was the policy of the Administrator to accept the exact amount of the overcharges¹ in full settlement of his claim.

Where there was a wilful violation, but no court action involved, it was the Administrator's policy to accept the exact amount of the overcharges, plus one-half thereof. (See *Garibaldi & Cuneo*, 9 T. C. 446, Sept. 25, 1947.)

¹"It has been our policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge. Congress gave the Administrator discretion to decide in what cases treble damage actions should be brought." Chester A. Bowles, Admr., O.P.A., in Hearings before the Senate Banking and Currency Committee on S. 1764, 78th Cong., 2nd Sess. 1944, p. 1415.

Where there was a wilful violation and court action was necessary, but settlement was made before trial, it was the Administrator's policy to accept the overcharge plus one-half thereof, plus court costs in full settlement of his claim. (See *Garibaldi & Cuneo*, 9 T. C. 446.)

The *Jerry Rossman* case involved deductibility of the exact amount of the overcharge, restitution of which was made by payment to the Administrator instead of to the customer who was overcharged.

Counsel is informed that Petitioner's payment involved herein is the exact amount of overcharges, but there is no proof on this in the record. It is petitioner's contention that payment to the Administrator of the exact amount of the overcharge plus any additions thereto (one-half, two times, attorney's fees and costs) is a deductible expense, without distinction as to type of payment. In the event this court is of the opinion that payment of the amount of overcharges is a deductible business expense and payment of any additions thereto is not a deductible business expense, under the unfavorable assumption (because of no proof) that petitioner's payment was the amount of the overcharge plus one-half thereof, petitioner would be entitled to a deduction of \$8,714.05. Or, in such an event, the case could be remanded for further proof on this point.

Judge Hand, in the *Jerry Rossman* case, said:

“* * * First, it seems apparent to us that the payment of the overcharge—which is all that is here involved—can on no theory be treated as the payment of a ‘penalty.’ Taken in its broadest sense, that word has a punitive, as opposed to a remedial, meaning; it covers fines and other exactions which are not restitution for a wrong, and are only justified, either as

a deterrent, or in order to satisfy an atavistic craving for retaliation. A seller's duty to return the overcharge to the 'terminal buyer': that is, to one 'who buys * * * for use, or consumption other than in the course of trade or business,' is so clearly not a 'penalty' under this definition that no argument can make it plainer than its bare statement. The only possible excuse for confusion is that Sec. 205(e) gave to the 'terminal buyer' a claim, not only to recover the overcharge, but twice its amount in addition; * * * However, the Administrator's claim, like the 'terminal buyer's' claim for which it is a substitute, is also made up of the overcharge and an addition of twice its amount; and the Commissioner must maintain that the part of it, which is made up of the overcharge, is a 'penalty' and loses its character as restitution even though the Administrator demands only the overcharges. There is no basis for such a conclusion."

Speaking of the exact amount of the overcharge, it is difficult to understand how the respondent can contend that the disgorging of an overcharge, or the restitution of a sum of money to which one is not entitled, is a penalty payment. The essential characteristic of a penalty is punishment for wrong-doing, such as requiring payment of the wrongdoer's *own* money or suffering imprisonment. To use an extreme illustration, if the only sanction imposed for theft were the return to the Government of the property stolen, it would be odd to say that thieves were being penalized.

Speaking of the payment in excess of the overcharge, Section 205 of the E.P.C.A. of 1942 (subsection (e) gives the Administrator the claim for treble damages) deals entirely with "Enforcement." Each of its seven subsec-

tions, from (a) to (g) deals in meticulous fashion with a variety of remedies.

In a context of such extraordinary precision, words are necessarily freighted with sharp distinctions. Not only does subsection (e) as amended deal with “a judgment in an action for damages under this subsection,” but subsection (b) provides the real penalty of “fine” or “imprisonment.” Moreover, subsection (d), which complements (b) and (e) expressly deals with both “damages” and “penalties,” thereby impressively emphasizing the contemplated distinction when the word “damages” was used.

If any doubts persist, they are removed by the legislative commentaries, which regard a consumer’s suit and the Administrator’s suit as cognate “actions for damages.” (Sen. Rep. No. 922, 78th Cong., 2nd Sess. (1944) 13.)

In *Crary v. Porter*, 157 F. 2d 410, 414 (C. C. A. 8), the Court said of Section 205(e) :

“In any attempted discussion therefore of whether the provision for increasing or multiplying the amount of an overcharge could be in any sense a real penalty, it would not be possible to maintain that under the statute the seller was being made to pay more than the actual damages which he had occasioned.”

And Douglas, J., in *Hulbert v. Twin Falls County*, 327 U. S. 103, 105, said the treble damage provisions “are remedial, not punitive in nature.”

If petitioner had repaid the overcharge plus an addition thereon to a consumer instead of the Administrator of O.P.A. “in compromise or settlement of pending or contemplated litigation in such cases,” it would have constituted damages deductible as ordinary and necessary

business expenses, according to Respondent's official ruling in I.T. 3627, C.B. 1943, p. 111, wherein he said consumer actions are "remedial in nature." See also I.T. 3762, C.B. 1945, p. 95. In I.T. 3630, C.B. 1943, p. 113, the Commissioner also ruled that a seller may deduct payments made to the United States because of overcharges on sales to consumers entitled to sue under Section 205(e). However, the Commissioner in 1946 reversed this latter rule by I.T. 3799, C.B. 1946-1, p. 56, and I.T. 3800, C.B. 1946-1, p. 82.

Without any cogent reasons for a distinction, the Commissioner ruled in the same I.T. 3627, C.B. 1943, p. 111, that payments to the Administrator like the one involved herein are not deductible because they "are in the nature of penalties for law violation."

If a customer paid an overcharge on an item for use or consumption in his trade or business, he was not permitted to sue. In such a case, the Administrator was given the right to sue. Inasmuch as it was a violation of the Regulations to pay over the ceiling prices the law makers apparently thought it would be inconsistent to permit the violator (the buyer for use in trade or business) to sue for the overcharge. Hence the buyer's suit was confined to the ultimate consumer, or, to quote Mr. Henderson, "the housewife in effect." See Hearings before the Senate Committee on Banking and Currency on the Emergency Price Control Act, 77th Cong., 1st Sess. (1940) 141.

Penalties have no monetary relation to the damage done or loss sustained by the overcharged buyer. Sec. 205(b) provided a \$5,000 fine or two years in prison as the "punishment for crime or offense" as Penalty is defined by Webster's Collegiate Dictionary (5th Ed.).

However, Sec. 205(e) provided for damages for "the estimated reparation in money for injury sustained" (see definition Damages, Webster's Collegiate Dictionary) which is measured by the amount of the overcharge.

POINT II.

Even if It Be the Payment of a Penalty, Its Allowance as a Business Expense Deduction Would Not Frustrate Any Sharply Defined National Policy.

The disallowance as a business expense deduction of penalties, the allowance of which would frustrate a sharply defined national policy is a "judicial gloss" as Judge Hand said in the *Jerry Rossman* case:

"The Revenue Act does not declare that penalties may not be deducted; the doctrine is a judicial gloss—and for that matter, a gloss of the lower courts only, save as the Supreme Court recognized it by implication in *Commissioner v. Heininger*." (320 U. S. 467.)

On the question of whether the allowance of the payment of the overcharge as a business expense deduction would frustrate a sharply defined national policy, Judge Hand had the following to say:

"This conclusion leads directly to the third question: whether, even though the overcharge was a 'penalty,' its allowance as a deduction would 'frustrate' any 'sharply defined policies' of the Emergency Price Control Act of 1942. It is impossible to find an answer in general terms; indeed any answer goes to the very root of one's theory of criminal law. Happily, in the case at bar, we are not left to specula-

tion, for we have an answer from the best possible source—the Administrator himself. The body of regulations, by which the United States sought to control prices during the last war, was extraordinarily complicated and difficult to comprehend. That was inevitable; the innumerable varieties of commercial transactions to be covered made possible nothing simpler. One may indeed argue, as the Commissioner does, that the more unsparing and relentless was the pursuit of offenders, however innocent they may have been of any wilful violation of the regulations, the more solicitous would they become to comply, and the more effective would be the enforcement of the Act. That had been a school of penology since the time of Draco; but it has not been the only school, and, as we read *Commissioner v. Heininger, supra*, the Supreme Court did not accept it. The Administrator did not believe that such a rigid and uncompromising policy was the best way to realize the purposes of the Act. When the amendment to Sec. 205(e) was being considered in 1944, he declared in a letter to the Senate Committee ‘that the protection of innocent violators from excessive damage was obviously desirable’; and that it had been his ‘policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge.’ He thought that Congress had given him discretion not to sue for ‘treble damages’ in some instances, and he had exercised that discretion so as ‘to avoid undue hardship in deserving cases.’ In short, he did not believe that it paid to sweep into the same pool with wilful or careless violators, violators for whom the daedalian mazes of the regulations had proved too much. Moreover, Congress showed in 1944 by the amendment of Sec. 205(e) that it agreed with the Administrator. It seems to us that we should accept these expressions

as evidence that in cases where the Administrator accepted the overcharge as sufficient, it did not 'frustrate' any 'sharply defined' policies of the Emergency Price Control Act of 1942."

Furthermore, as the Supreme Court said in the *Heininger* case:

"The language of 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." (320 U. S. at 474.)

And to adopt the language of that opinion to the present circumstances, a denial of the deduction attaches "a serious punitive consequence" to the Administrator's finding, which is purely *ex parte* and not impartial, and "which Congress has not expressly or impliedly indicated should result from such a finding." (*Id.* at 474-5.)

And as Judge Denham said in *Helvering v. Hampton*, 79 F. 2d 358, 361 (C. A. 9th, 1935):

"Even if unethical conduct in business were extraordinary, restitution therefore is ordinarily expected to be made from the person in the course of whose business the wrong was committed. It is therefore deductible under Sec. 214(a)(1)." (Revenue Act of 1921, which is same as Sec. 23(a), Internal Revenue Code.)

It is not easy to understand what "sharply defined" national policy would be frustrated if an overcharge, which has already been taxed once as income, is deducted when paid back. Under the penalty doctrine, the feared frustration is the mitigation of the penalty through its deduction from otherwise taxable income. Here, however, the appli-

cation of the penalty doctrine of nondeductibility would impose a "serious punitive consequence" rather than mitigate an existing punitive consequence. The taxpayer not only returns the overcharge itself, but pays income or excess profits taxes as if the overcharge were never returned. Indeed national policy was effecuated, not frustrated, by requiring the return of the overcharge plus additions thereon to compensate for the expense and trouble of securing the restitution plus damages suffered.

Conclusion.

In view of the foregoing, it is believed that petitioner is entitled to deduct the \$13,071.08 paid to the Administrator in July, 1944. Therefore, the decision of the Tax Court should be reversed and it should be directed to enter a decision in favor of petitioner.

Respectfully submitted,

TODD W. JOHNSON,

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12295

NATIONAL BRASS WORKS, INCORPORATED,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

**BRIEF FOR PACIFIC MILLS AS AMICUS
CURIAE.**

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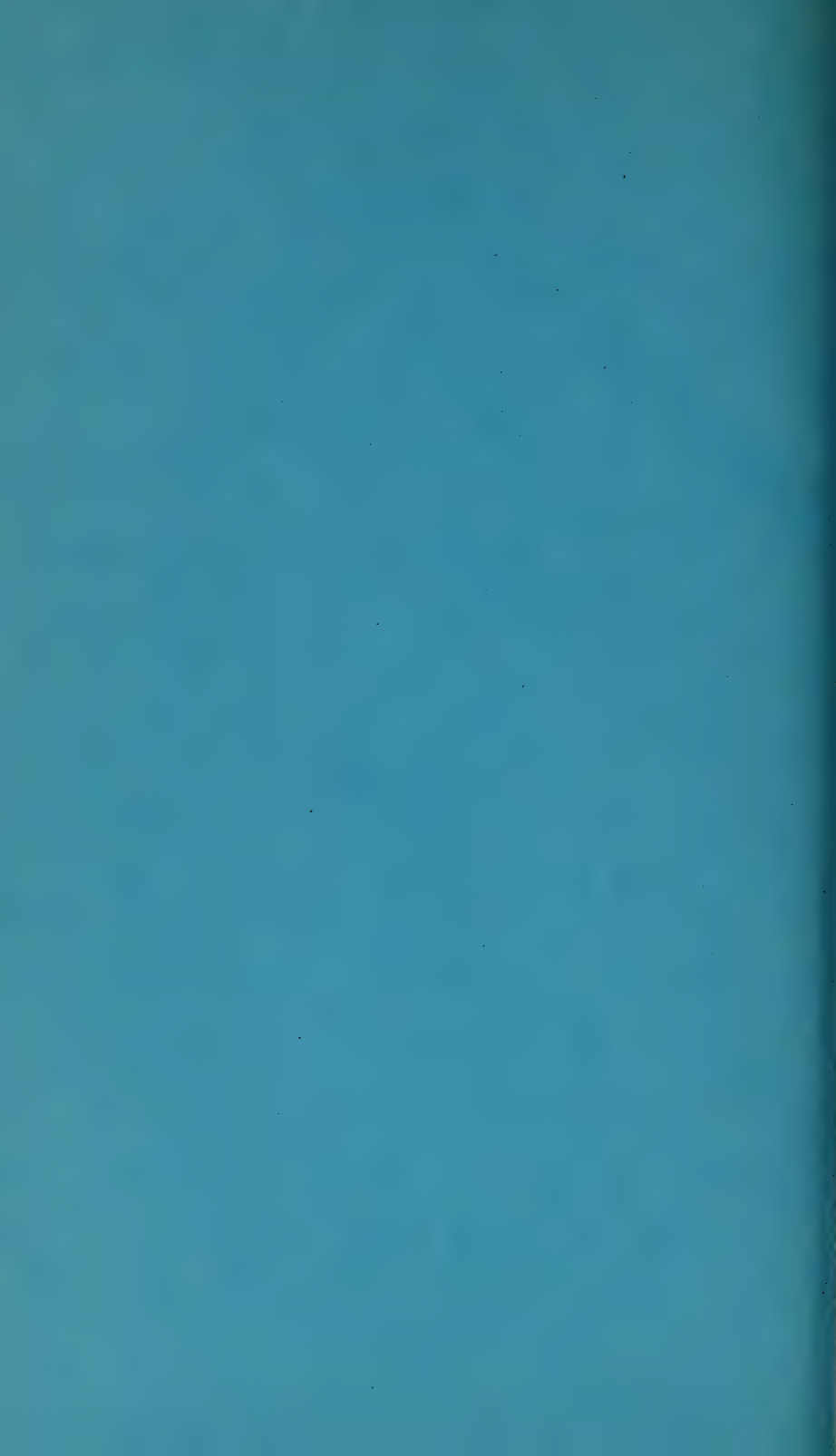


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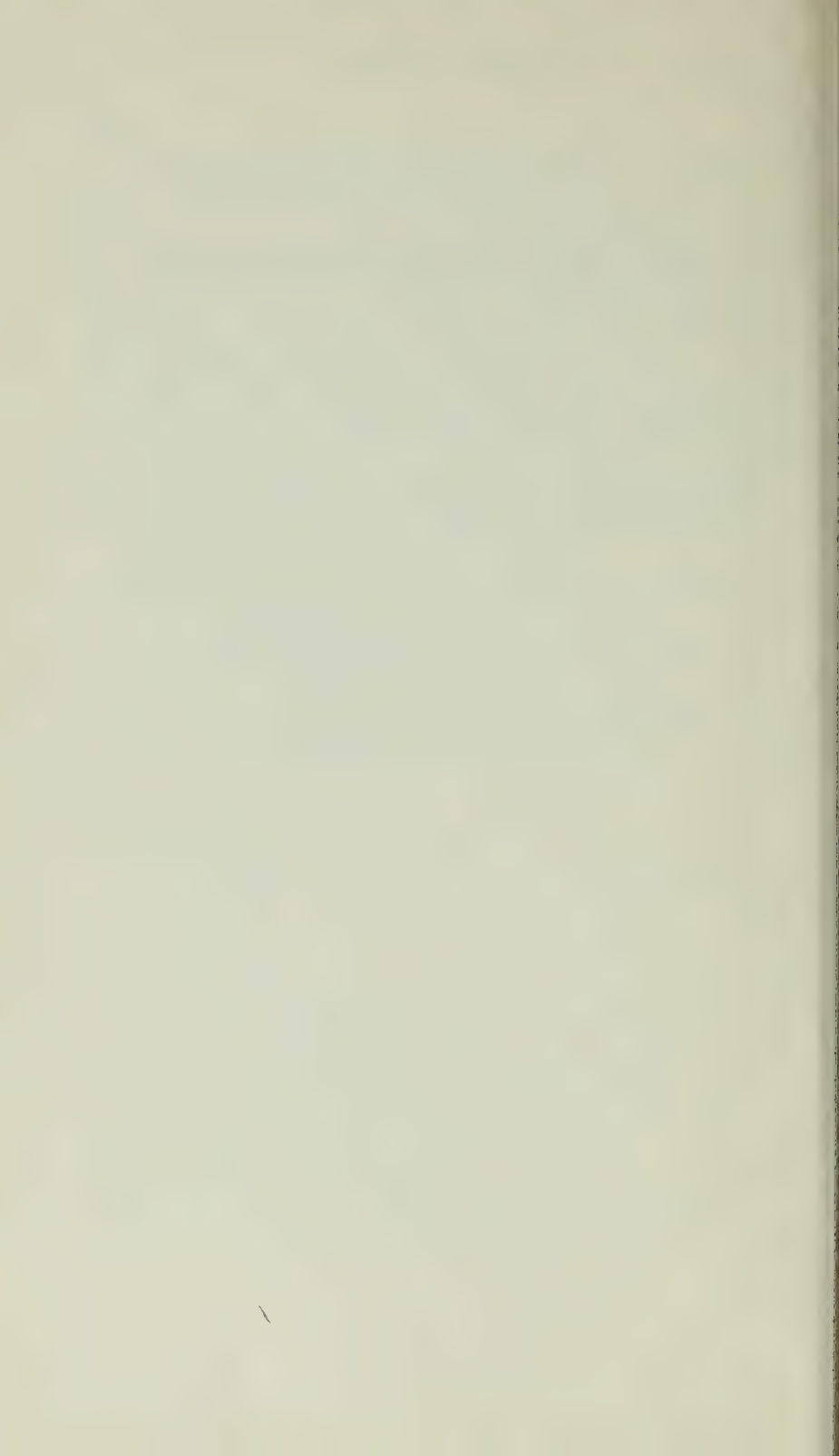
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12295

NATIONAL BRASS WORKS, INCORPORATED,
PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

**BRIEF FOR PACIFIC MILLS AS AMICUS
CURIAE.**

I.

INTRODUCTION

A. Statement of Pacific Mills' Interest

We submit this brief *amicus curiae* because this Court's decision may vitally affect the interests of Pacific Mills.

Pacific Mills is a Massachusetts corporation whose principal office and place of business are situated at 140 Federal Street, Boston, Massachusetts. In computing its income tax and excess profits tax for the calendar year 1944 Pacific

Mills deducted a payment of \$2,065,842.02 made in that year to the Office of Price Administration. Pacific Mills made the payment in settlement of an O.P.A. complaint alleging that Pacific Mills had overcharged its customers in that amount. Pacific Mills' officers were firmly convinced that the Company had not violated any price control statute or regulation. Nonetheless they decided to settle and pay the Price Administrator an amount not exceeding the alleged overcharges. They did so in order to avoid protracted litigation and unfavorable publicity, and in reliance upon promises by O.P.A. that revised regulations would ratify Pacific Mills' prior interpretations reflecting its principal differences with O.P.A. The revised regulations were later promulgated. A deficiency letter of August 10, 1948, disallowed the deduction of \$2,065,842.02 claimed for 1944, and Pacific Mills has duly filed a petition with the Tax Court contesting the asserted deficiency.

B. The Tax Court Decision

The Tax Court's memorandum decision against the taxpayer in this case relies solely upon three previous Tax Court decisions. *Scioto Provision Co. v. Commissioner*, 9 T.C. 439 (1947); *Garibaldi & Cuneo v. Commissioner*, 9 T.C. 446 (1947); and *Jerry Rossman Corporation v. Commissioner*, 10 T.C. 468 (1948), *rev'd*, 175 F. 2d 711 (C.A. 2, 1949).¹ These decisions, in turn, had approved two rulings by the Commissioner of Internal Revenue. I.T. 3627, C.B. 1943, p. 111; I.T. 3799, C.B. 1946-1, p. 56. The Commissioner had ruled that if a taxpayer charged over-the-ceiling prices and then paid the overcharge to the Price Administrator, the payment was a penalty and hence not deductible as an ordinary and necessary business expense, no matter how innocent or inadvertent the overcharge was.²

¹ The Tax Court decided the *Rossman* case for the Government by a bare 9-7 majority. On appeal the decision was unanimously reversed.

² On the other hand, the Commissioner ruled that payments made by violators to the consumers themselves were deductible. I.T. 3627, *supra*.

Although the Tax Court cited three cases as authority for its decision here, only one of the three cases—the *Scioto Provision* case—attempted a reasoned defense of the Commissioner's rulings. In the *Garibaldi & Cuneo* case the Tax Court more or less assumed its conclusion; and in the *Rossman* case the Tax Court simply considered the *Scioto* case essentially indistinguishable.³ Since the Tax Court's decision in this case the Court of Appeals for the Second Circuit has unanimously reversed the Tax Court's decision in the *Rossman* case. *Jerry Rossman Corporation v. Commissioner, supra*. And in reversing the Tax Court, the Second Circuit has completely destroyed the rationale on which the Tax Court and the Commissioner sought to rely in this case.

The Tax Court's decisions and the Commissioner's rulings tacitly acknowledge that, but for the notion that any payments to O.P.A. are penalties, they are clearly deductible as ordinary and necessary business expenses. Internal Revenue Code, Section 23(a) (1)(A).⁴ However, in its *Scioto* decision the Tax Court, like the Commissioner, invoked a number of lower court decisions holding generally that penalties are not deductible because the deduction would in effect mitigate the penalty.⁵ In order to buttress its conclusion the Tax Court at the same time invoked the Supreme Court's decision in *Commissioner v. Heininger*, 320 U. S. 467 (1943). We believe, as the Second Circuit has persuasively indicated in the *Rossman* case, that the Tax Court misapplied the so-called penalty decisions and misinterpreted the *Heininger* decision.

In the *Heininger* case the Supreme Court held that legal expenses incurred in resisting a postal fraud order are de-

³ According to the Tax Court, the only difference between the two cases was that in the *Scioto* case O.P.A. "had asserted a claim for treble damages," whereas in the *Rossman* case "no claim had been asserted against the petitioner and no violation of the regulations had been charged against it." *Jerry Rossman Corp. v. Commissioner, supra*, at 472.

⁴ See further p. 21, *infra*.

⁵ See, e.g., *Great Northern Railway Co. v. Commissioner*, 40 F. 2d 372 (C.A. 8, 1930); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C.A. 2, 1931); *Standard Oil Co. v. Commissioner*, 129 F. 2d 363 (C.A.7, 1942); *Helvering v. Superior Wines & Liquors, Inc.*, 134 F. 2d 373 (C.A.8, 1943).

ductible as ordinary and necessary business expenses though the order is eventually sustained. Mr. Justice Black emphasized in his opinion that the "language of §23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." 320 U. S. at 474. In addition he observed that the Commissioner, the Tax Court and the Federal Courts have at times "narrowed the generally accepted meaning of the language used in §23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct." 320 U. S. 467, 473. The Tax Court's *Scioto* opinion quoted this statement and then noted that our national price control policy was "the prevention of inflation . . . of vital importance to the prosecution of the war." *Scioto Provision Co.*, *supra*, at 445. The Tax Court, accordingly, disallowed the deduction in order to protect what it considered a "'sharply defined' national policy 'proscribing particular types of conduct.'" If the deduction were allowed, the Tax Court reasoned, there would be "partial mitigation of the penalty" and this mitigation "would be against public policy." *Ibid.*

However, the Tax Court reached its conclusion without a careful analysis and a proper understanding of the "sharply defined" national price control policy "proscribing particular types of conduct." In reversing the Tax Court's *Rossman* decision, the Second Circuit fully exposed the frail reasoning reflected by the Commissioner's rulings and ratified in the *Scioto* decision. The Commissioner and the Tax Court simply assumed that in disallowing the claimed deduction of otherwise allowable business expenses, they were necessarily preventing the mitigation of a penalty and thereby necessarily protecting some "sharply defined" national policy. Actually the Commissioner and the Tax Court did something quite different. They did not forestall the mitigation of any penalty because the return of an overcharge was not the payment of a penalty. And in preventing the deduction they not only failed to protect, but even

frustrated, the “sharply defined” policy residing in the Price Control Act. For here, as in the *Heininger* case, in disallowing the deduction of the returned overcharge, the Commissioner and the Tax Court affirmatively attached “serious punitive consequences” which Congress and the Price Administrator painstakingly refused to impose. See *Commissioner v. Heininger, supra*, at 474.

II.

ARGUMENT

A. Allowance of the Deduction Would Not Mitigate a Penalty Nor Frustrate a Sharply Defined National Policy Proscribing Particular Types of Conduct

Undoubtedly the underlying purpose of the Emergency Price Control Act of 1942 was the prevention of inflation and its innumerable consequences. See *Yakus v. United States*, 321 U. S. 414, 423 (1944). See also Emergency Price Control Act of 1942, Section 1(a), 56 Stat. 23 (1942), 58 Stat. 632 (1944), 50 U.S.C.A. App §901(a) (1944). In order to implement this purpose Section 4 (a) of the Emergency Price Control Act made it unlawful “for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity” in violation of any order or regulation appropriately established by the Administrator of the Office of Price Administration.⁶

This basic provision, however, did not reflect a “sharply defined” national policy which indiscriminately imposed serious punitive consequences. See *Commissioner v. Heininger, supra*, at 473, 474. Indeed the Supreme Court’s decision in *Commissioner v. Heininger, supra*, expressly requires us to look beyond the question whether a taxpayer’s expense was incurred because of unlawful conduct, whether merely alleged or finally established. As the *Heininger* opinion emphasizes, courts are “not required to regard”

⁶ 56 Stat. 28 (1942), 50 U.S.C.A. App. § 904(a) (1944).

the unlawful character of a taxpayer's conduct "as a rigid criterion" of deductibility. 320 U. S. at 475. Instead the *Heininger* opinion focuses upon the details of the specific consequences which Congress has attached to a particular type of proscribed conduct. 320 U. S. at 473, 474. And as the *Heininger* opinion indicates, those details must be thoroughly analyzed before narrowing "the generally accepted meaning of the language used in §23(a)." *Id.* at 473, In each case, as Judge Learned Hand has put it, the allowance of a deduction "depends upon the place of sanctions in the scheme of enforcement of the underlying act." *Jerry Rossman Corporation v. Commissioner, supra*, at 713. In this case it is the remedial and enforcement provisions of the Emergency Price Control Act and the pattern of its administration which "sharply" define the relevant public policy.

1. *The Original Provisions of Section 205(e) of the Emergency Price Control Law*

Section 205 of the Price Control Act of 1942 provided a full panoply of remedies. "In the Emergency Price Control legislation Congress was as much concerned with remedies as with substantive prohibitions. It knew that effectiveness of the latter depended altogether upon the scheme for enforcement. Accordingly, both in the original Act and in later amendments, it covered the matter of remedies in the greatest detail and precision . . . It is not excessive to say that perhaps no other legislation in our history has equalled the Price Control Act in the wealth, detail, precision and completeness of its jurisdictional, procedural and remedial provisions. . . . The scheme of enforcement was highly integrated, with the parts precisely tooled and minutely geared. . . ." Rutledge, J., in *Porter v. Warner Holding Co.*, 328 U. S. 395, 403-04 (1946). See also *Kessler v. Fleming*, 163 F. 2d 464, 466 (C.A. 9, 1947). Nowhere do the enforcement sections of the Price Control Act suggest any extra or spe-

cial tax liability as one of the varieties of remedies to be visited upon O.P.A. law violators.⁷

Section 205 of the Act authorized criminal sanctions, injunctions and revocable licenses as means of enforcing price control policy. Any person who wilfully violated Section 4 of the Act was subject, upon conviction, to a maximum punishment of two years' imprisonment and \$5,000 fine.⁸ Section 205(a) authorized the Administrator to seek, and the Federal Courts to grant, broad equitable remedies enjoining violations.⁹ Section 205(f) authorized the Administrator to require licenses which could be revoked by court order in the event of price control violation, thereby effectively terminating the licensee's business.¹⁰

Section 205(e) authorized consumers and the O.P.A. Administrator to bring civil actions.¹¹ As originally enacted that Section declared that if a sale violated a maximum price regulation, the purchaser "for use or consumption other than in the course of trade or business" could sue the seller "either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."¹² If a violation occurred and the purchaser was not entitled to sue, the Act authorized the Administrator to "bring such action under the subsection on behalf of the United States." Thus the Act authorized, but did not require, the Administrator to bring an action for treble the amount of the overcharges where the purchaser was not entitled to sue. And the Administrator could bring an action, identical to the consum-

⁷ But compare Section 6(a) of the Stabilization Act of 1942, 50 U.S.C.A. App. §965(a), where Congress specifically authorized the disallowance, for income tax purposes, of the deduction of salaries paid in violation of that Act.

⁸ Section 205(b), 56 Stat. 23,33 (1942), 50 U.S.C.A. App. §925(b) (1944).

⁹ 56 Stat. 23,33 (1942), 50 U.S.C.A. App. §925(a) (1944). This provision authorized the Administrator to enforce the restitution of excessive rentals to tenants. *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946).

¹⁰ 56 Stat. 23, 33 (1942), 50 U.S.C.A. App. §925(f) (1944).

¹¹ 56 Stat. 23,34 (1942).

¹² 56 Stat. 23,34 (1942).

er's action, only if the consumer was not entitled to sue. See Sen. Rep. No. 931, 77th Cong., 2d Sess. (1942) 8, 9-10, 26.

2. *The Administrator's Enforcement Policy*

As administration of the Emergency Price Control Act proceeded, resentment against it generated and increased. In 1944 some of the opposition to O.P.A. centered on the provisions of Section 205(e) authorizing treble damage actions by consumers and the Administrator. By April, 1944, the Congress was considering bills to amend the provisions of Section 205(e). A Senate bill proposed limitation of liability in civil actions to "not less than one and one-half and not more than three times the amount of the overcharge." Section 108(a), S. 1764, 78th Cong., 2d Sess. (1944); see also Section 7, H.R. 4941, 78th Cong., 2d Sess. (1944); Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944). A House Committee proposed that civil judgments be limited to the face amount of the proved overcharges. H.R. Rep. No. 1366, 78th Cong., 2d Sess. (1944).

On April 1, 1944, Chester Bowles, then Administrator of the Office of Price Administration, addressed a letter to Senator Wagner, Chairman of the Senate Committee studying the proposed amendments. Mr. Bowles' letter protested any revision which would authorize a court to award a civil judgment for less than triple the amount of the overcharges. Mr. Bowles emphasized that "The most persuasive argument for the change is to protect innocent violators from excessive damages. *Such protection is obviously desirable and it has been our policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge. Congress gave the Administrator discretion to decide into (sic) what cases treble damage actions should be brought. That discretion has been exercised and will in the future be exercised to avoid undue hardship in deserving cases.*" *Hearings before the Senate Banking and Currency Committee on S. 1764, 78th Cong., 2d Sess. (1944) 1415, 1417. (Italics supplied.)* See also *Hearings before the Senate*

Banking and Currency Committee on S. J. Res. 30, 79th Cong., 1st Sess. (1945) 61, 89.

The Administrator's interpretation of Section 205(e) and his consistent administrative practice simply and clearly expressed and executed a sharply defined national policy on innocent overcharges. See *Adams v. United States*, 319 U. S. 312, 314 (1943); *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, 352 (1941).¹³ Where overcharges were innocent or inadvertently collected, the overcharger merely surrendered them and no penalty was imposed. If the Administrator thought that the violation was wilful, he sought a penalty in addition to the overcharge, or he invoked the more drastic criminal sanctions. In other words, the Administrator enforced national policy by siphoning the excessive receipts out of circulation. See *Barksdale v. Fleming*, 160 F. 2d 494, 495 (C.A. 8, 1947); *Crary v. Porter*, 157 F. 2d 410, 414 (C.A. 8, 1946). He protected the economy by damming at its source each inflationary trickle, which, if allowed to accumulate would have produced an overwhelmingly inflationary flood. At the same time he made certain that the innocent overcharger was not unjustly enriched to the disadvantage of his competitors. See *Woods v. Stone*, 333 U. S. 472 (1948). Having protected the economy against the inflationary and competitive consequences of innocent or inadvertent overcharges, the Price Administrator considered the matter closed. He did not invoke any of the punitive sanctions, for there was no occasion to do so. To borrow the felicitous language of Judge Learned Hand, the Administrator "did not believe that it paid to sweep into the same pool with wilful or careless violators, violators for whom the daedalian mazes of the regulations had proved too

¹³ See Davis, *Administrative Rules-Interpretative, Legislative, and Retroactive*, 57 *Yale L. J.* 919, 936 (1948). "... (U)sages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." *United States v. McDaniel*, 7 Pet. 1, 14(1833).

much.” *Jerry Rossman Corporation v. Commissioner, supra*, at 714.

3. *The 1944 Amendment to Section 205(e) of the Price Control Law*

The Administrator's practice assumes still greater significance in view of the action taken by Congress on S. 1764. That bill as finally enacted limited damage payments to the face amount of the overcharge where the defendant proved that the violation was neither “wilful nor the result of failure to take practicable precautions.”¹⁴ The 1944 amendment clearly ratified and codified the Administrator's sharp distinction between the return of the overcharge and the payment of any damages beyond the overcharge. At the same time it subjected the Administrator's practice to judicial supervision. The Administrator's practice and the amendment of 1944 clearly indicate “that in cases where the Administrator accepted the overcharge as sufficient,” the allowance of a deduction would “not ‘frustrate’ any ‘sharply defined’ policies of the Emergency Price Control Act of 1942.” *Jerry Rossman Corporation v. Commissioner, supra*, at 714.

The legislative history of the 1944 amendment reveals, in extraordinary detail, Congress' complete understanding and approval of the underlying administrative policy. In the *Rossman* case the Second Circuit relied upon this policy, as well as the 1944 amendment, in concluding that a returned overcharge was deductible. As the opinion explained, “Congress showed in 1944 by the amendment of §205(e) that it agreed with the Administrator.” *Id.* at 714. The amendment of 1944 is even more pertinent and controlling here. In the *Rossman* case the settlement with O.P.A. was governed by the Price Control Act before it was amended in 1944. In this case the settlement was governed by the Act as amended in 1944.

¹⁴ Section 108(b) of the Act of June 30, 1944, 58 Stat. 640 (1944), 50 U.S.C.A. App. §925(e) (1944).

As we have seen, Section 205(e) of the Emergency Price Control Act, as originally enacted in 1942, authorized the consumer or, when he was barred from suit, the O.P.A. Administrator to sue for \$50 or for "treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."¹⁵ In 1944 the Senate Committee on Banking and Currency, after hearings, reported out S. 1764.¹⁶ That bill would have authorized courts, in their discretion, to award one and a half times the amount of the overcharge "where violations occurred unintentionally and despite the exercise of due diligence to prevent them."¹⁷

This Senate bill and a companion bill introduced in the House of Representatives¹⁸ were drastically amended in the course of floor debate. Accordingly, that extensive debate, rather than the Committee Reports, reflects the Congressional understanding of the legislation ultimately enacted as Section 108(e) of the Stabilization Extension Act of 1944.¹⁹ The debate fully establishes that Congress did not consider the payment of the overcharge as the payment of a penalty.

In the early stages of the debate on S. 1764 Senator Lucas offered an amendment confining treble damage liability to sellers who "knowingly" overcharged. It was Senator Lucas' view that individuals making an honest mistake "*should not be penalized* in a suit in the Federal court for treble damages, either by the buyer or by the Administra-

¹⁵ 56 Stat. 23, 34 (1942).

¹⁶ *Hearings Before the Senate Banking and Currency Committee on S. 1764*, 78th Cong., 2d Sess. (1944); Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944). See also Section 7, H.R. 4941, 78th Cong., 2d Sess. (1944).

¹⁷ Sen. Rep. No. 922, 78th Cong., 2d Sess. (1944) 13-14.

¹⁸ H. R. 4941, 78th Cong., 2d Sess. (1944).

¹⁹ 58 Stat. 632, 640 (1944), 50 U.S.C.A. App. §925(e) (1944). The full debate appears in 90 Cong. Rec. 5375-5384, 5435-5451, 5886-5887 (1944).

Informed Congressional discussion of pending legislation is, of course, highly relevant in determining the policy and scope of a statute. *Helvering v. Griffiths*, 318 U.S. 371, 380-387 (1943); *United States v. Lovett*, 328 U.S. 303, 308-310 (1946); *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948).

tor." 90 Cong. Rec. 5376 (1944). (Italics supplied.) The floor representative of the Senate Committee, in defending the Committee's recommendation against Senator Lucas' proposed amendment, made it quite clear that there was a vital difference between the seller's mere return of the overcharge, which prevented "unjust enrichment," and the payment of an amount beyond the overcharge, which had the features of a penalty.

"Mr. RADCLIFFE . . . Suppose there is an overcharge; let us suppose it is made innocently . . . certainly the seller should not pocket it. If an article should be sold for \$25 but the dealer actually sells it for \$60, no matter how innocent he may be, should he be entitled to pocket the \$35, if he acted contrary to law and regulations? *There is no justification in the world for such unwarranted profits. So any way we look at it the amount of the overcharge has to be returned. I care not whether it was made wilfully and knowingly or not. the seller has money to which he is not entitled . . . certainly no overcharge should be pocketed and retained by the seller irrespective of whether or not he obtains it in good faith.*

"*There can be no justification in the world for that. The only question is whether there shall be any penalty.* What we have done in this case is to fix a minimum penalty, adding 50 percent to the amount of the overcharge, which is, after all, a very mild punishment, and one which, I feel, we must provide under the circumstances. Otherwise, we can conceive of a situation of a man taking chances and then going into court and saying, 'I can probably demonstrate to the court that it was done innocently, and therefore at the most I shall be obliged to return only the money which is determined to be the overcharge.' If we insert the words 'wilfully and knowingly,' we open up the courts to many cases of that kind. In normal times that might be proper, but if we are to undertake to execute a law which should be enforced, it seems to me that *a moderate penalty, 50 percent in addition to the overcharge, is reasonable.*

"Mr. LUCAS. On what theory should an honest individual be penalized, even in time of war?

"Mr. RADCLIFFE. Whether the person is innocent or not, if there is a rule or regulation put into operation by the O.P.A. which provides that an article should be sold for \$50 and he sells it for \$75, should he be entitled to put the \$25 in his pocket as *unjust enrichment*?"

"Mr. LUCAS. No; and under this provision, if I read it right, the court would have the power to compel him to pay the \$25 back. What I object to is letting anyone collect treble damages." 90 Cong. Rec. 5377-5378 (1944). (Italics supplied.)

During the debate Senator Taft made a similar sharp distinction between an overcharge and a penalty:

"We modified the original provision for three times the overcharge and made it one and one-half times so that *there would be a penalty amounting to 50 percent of the overcharge*. The penalty was to be imposed because the violator had not done right. It is very difficult to prove a man's wilful violation, and if there is no incentive to comply with the law he may not bother to comply with it. I think it will be very difficult to make any use whatever of this damage section if the word 'wilful' is made a part of it. I believe that the amount of \$50 might be modified. As I see it now, there is no great objection to one and one-half times the overcharge as being a compulsory fine. *That means he has to pay back the overcharge and 50 percent more as a penalty for having violated the price administration law.*" 90 Cong. Rec. 5383 (1944). (Italics supplied.)

Before Senator Lucas' amendment to S. 1764 could be adopted, Senator Chandler proposed an alternative amendment which would require a seller-defendant to prove that his violation was neither wilful nor the result of failure to take practicable precautions against occurrence of the violation. 90 Cong. Rec. 5382 (1944). The seller who sustained the burden of proof proposed by Senator Chandler would have a complete defense in a civil action. Senator Lucas was impressed by the wisdom of Senator Chandler's proposal that the defendant should sustain the burden of

proving innocence. But evidently Senator Lucas had also been impressed by Senator Radcliffe's explanation of the difference between unjust enrichment and penalties. Accordingly, before accepting Senator Chandler's proposal, Senator Lucas asked Senator Chandler to revise his amendment in order to ensure that even an innocent or inadvertent violator would at least return the amount of the overcharge. The conclusion of the debate in which Senator Lucas and Senator Chandler reached a meeting of the minds clearly demonstrates that under the so-called Chandler amendment to S. 1764, as modified by Senator Lucas' caveat, (1) no penalty was to be imposed upon the innocent or inadvertent overcharger who paid over his excess intake either to the consumer or to the Government, and (2) a penalty in the form of extra damages was imposed on the reckless or wilful overcharger:

"Mr. LUCAS . . . Every individual who knows anything about the average merchant of this country is convinced that 95 percent of the merchants are honest, sincere, and patriotic citizens and are attempting to comply in every way with the prosecution of the war effort. There may be 5 percent, perhaps, who are willing to cheat and chisel in connection with the interpretation of the rules and regulations of the O.P.A. I have no time for that unlawful group; *but it seems to me that the individuals attempting to obey the law through legal advice and counsel and through constant study of regulations which are constantly flowing from the O.P.A. office in Washington as well as the regional offices throughout the country ought to be protected to the limit.*

"... Of course, if I should withdraw the amendment and the amendment of the Senator from Kentucky should be adopted, it would simply mean that the rule of the burden of proof would be shifted with respect to the proof of what is wilfully and what is knowingly done in violation of the act. The burden of proof is always on the individual who alleges it, but under the Chandler amendment we would place the burden of proof upon the seller to show that the violation is not wilful or was not done in a knowing manner.

"It is my understanding also that the amendment offered by the junior Senator from Kentucky in nowise provides that if the buyer or Administrator brings a suit and the seller's defense is that he did not wilfully or knowingly violate any order or any provision of the O.P.A. Act he is then relieved of any damages whatsoever and he also has a right to any overcharge. Am I correct in that?"

"Mr. CHANDLER. That is correct.

"Mr. LUCAS. I thank the Senator. I may suggest to him that I believe if I should abandon my amendment, *there ought to be a provision in his amendment whereby the overcharge should be returned either to the buyer or to the Administrator.*

"Mr. CHANDLER. *I have no objection to that,* because in the cases I mentioned the overcharge was paid back promptly. Those who have made the overcharges want to pay them back.

"Mr. LUCAS. Mr. President, I think that under the circumstances, and in view of the fact that I am a strong advocate of this type of legislation as an anti-inflationary measure, I shall withdraw the amendment, but this debate should forcibly draw the attention of those administering this act to the necessity of the utmost fair dealing with merchants who are making every effort to comply with the law. *These men and women should not be unduly harassed or disturbed when such violations occur.* I am convinced that in the main the great majority of enforcement officers are trying to do what is right. There are always a few who make trouble for all. They should be eliminated when discovered, whether they are found in the field or in the office in Washington, D. C." 90 Cong. Rec. 5383-5384 (1944). (Italics supplied.)

On the day following this significant debate, June 7, 1944, the Senate passed the Chandler amendment, modified to incorporate Senator Lucas' suggestion:

"It shall be an adequate defense to any suit or action . . . if the defendant proves that the violation of the regulation, order, or price schedule prescribing a maximum price or maximum prices was neither wilful

nor the result of failure to take practicable precautions against the occurrence of the violation.” 90 Cong. Rec. 5645 (1944).

The Chandler amendment further provided that: “Nothing in this section shall be construed to deprive the courts of the power to assess against the defendant the amount of the overcharge.” *Ibid.* See also 90 Cong. Rec. 5435, 5450-5451 (1944). The Chandler amendment was incorporated in S. 1764 as passed by the Senate and sent to the House on June 9, 1944. 90 Cong. Rec. 5645 (1944).

On June 13, 1944, the House of Representatives began to consider H. R. 4941 and S. 1764 as it came to the House from the Senate. Early in the debate Congressman Sumner offered an amendment to H. R. 4941 which provided that damages should be “not more than . . . treble the amount of the overcharge.” 90 Cong. Rec. 5882 (1944). This provision survived the House debate, was accepted by the Conference Committee Report,²⁰ and was ultimately incorporated in the bill as enacted.

During the House debate Congressman Goodwin offered, and the House approved, a further amendment to H. R. 4941 which was similar to the Chandler amendment. 90 Cong. Rec. 5886, 5887 (1944). The Goodwin amendment provided, in effect, that the simple overcharge would be the maximum recovery where the violation was neither wilful nor the result of failure to take practicable precautions. The House debate on the Goodwin amendment was along the same lines as the Senate debate on the Chandler amendment. Congressman Goodwin explained his amendment as follows:

“The amendment puts the burden of proof on the defendant and is unique in that respect. There is no presumption of innocence in his favor. He must go forward. But if he satisfies the court with his statement of the case the judge may say to him, ‘*I believe you are an honest merchant who has acted in good faith. I am not going to put upon you the stigma of a penalty.*’

* * * * *

²⁰ H. R. Rep. No. 1698, 78th Cong., 2d Sess. (1944) 10, 23, 24.

“This amendment does not protect the wilful violator of the regulations or the man who fails to take reasonable precautions, and that man deserves no protection. *It does seek to protect the merchant who, in good faith, does all he reasonably can to cooperate, and he ought to be protected.*

“The amendment leaves this bill thoroughly effective against the dishonest merchant and the chiseler, *but protects the honest merchant from being penalized for an honest mistake.*” 90 Cong. Rec. 5886 (1944). (Italics supplied.)

Congressman Murphy, supporting the Goodwin amendment, stated that the amendment “had for its purpose freeing merchants of *punitive damage* liability in consumer civil suits if they could show the overcharges were unintentional.” 90 Cong. Rec. 5887 (1944). (Italics supplied.) Finally Congressman Gwynne, who also supported the Goodwin amendment, stated:

“What is the situation today? If you violate some regulation, even though the violation may be technical and minor, they can bring you into court and, regardless of your carefulness and regardless of your lack of wilful intent, punish you for violation of the regulation.

“What does this amendment do? The law would be the same, the procedure would be the same, except that when the defendant was brought into court charged in this quasi-criminal action he would be allowed to prove, if he could prove it, two things: First, that he had not acted wilfully, and second, that he had not been negligent in taking practicable precautions against the occurrence of the violation. *In other words, if he could show that he had cooperated honestly, then he would be excused from the penalty but would be required to pay the overcharge.*” 90 Cong. Rec. 5887 (1944). (Italics supplied.)

In the wake of this extensive and illuminating debate the Congress passed Section 108(e) of the Stabilization Extension Act of 1944, which provided that the seller would be liable for “not more than three times the amount of the

overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, . . . *Provided, however,* That such amount shall be the amount of the overcharge or overcharges . . . whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation . . .” 58 Stat. 632, 640-641 (1944), 50 U.S.C.A. App. §925(e) (1944).

In the present case the petitioner returned the overcharges after the enactment of the 1944 amendment and pursuant to its provisions. The *Rossman* decision, fortified by the legislative history which we have just outlined, directly and solidly sustains the petitioner’s contention that it is entitled to deduct the overcharge payment. Again and again, as we have seen, the legislative debate plays upon the theme that the return of an overcharge is not a penalty and that only a payment in addition to the overcharge has penal aspects. Even if the petitioner paid an amount in addition to the overcharge, it is certainly entitled to deduct the overcharge itself.²¹ As Judge Hand’s opinion points out, “recovery of three times the overcharge is no less a recovery of the overcharge because it includes the penalty along with it. Hence, if the taxpayer had been able to distribute the overcharge to the ‘terminal buyers,’ and had done so, the distribution would have been deductible . . . the Administrator’s claim, like the ‘terminal buyer’s’ claim for which it is a substitute, is also made up of the overcharge and an addition of twice its amount . . .” 175 F. 2d at 712.²²

²¹ The non-penal nature of the overcharge payment is not affected by any payment beyond the amount of the overcharge. Every state imposes a number of taxes, and, in addition, imposes penalties upon those who neglect to pay their taxes. The Internal Revenue Code authorizes the deduction of tax payments to the states just as the *Rossman* decision permits the deduction of overcharge payments to O.P.A. Obviously the taxpayer does not lose his deduction for taxes paid merely because he pays an additional penalty for failing promptly to pay his taxes. Just as the tax remains a deductible tax, so the overcharge remains a deductible overcharge—even though an additional amount may be paid as a penalty.

²² In fact, Judge Hand points out that it is by no means “absolutely certain” that the payment of the addition is the payment of a penalty—although he so assumes for the purposes of the *Rossman* decision. 175 F. 2d at 712.

B. The Court Decisions Do Not Sustain the Commissioner's Contention That Overcharge Payments Are Non-Deductible Penalties.

There are a number of judicial statements as to the nature of the Administrator's treble damage action under Section 205(e) of the Emergency Price Control Act which the Government may invoke in these proceedings. For example, some Federal courts have characterized the treble damage action as penal in barring the O.P.A. Administrator's treble damage actions against survivors of the alleged violator. See, e.g., *Bowles v. Farmers' National Bank of Lebanon, Ky.*, 147 F. 2d 425 (C.A. 6, 1945); *Porter v. Elliott*, 69 F. Supp. 652 (E.D. Pa. 1946), *aff'd sub nom Fleming v. Elliott*, 163 F. 2d 215 (C.A. 3, 1947); *Porter v. Montgomery*, 163 F. 2d 211, 215 (C.A. 3, 1947); *United States v. Murray*, 75 F. Supp. 216 (D. C. N. H., 1947).

But there is an equally imposing array of opinions which indicate that the Administrator's action is remedial and not penal in nature. In *Kessler v. Fleming, supra*, at 468, this Court declined to embrace the rationale of the Sixth Circuit in *Bowles v. Farmers' National Bank, supra*. This Court took "the view that the treble damage sanction is remedial rather than punitive." *Kessler v. Fleming, supra*,²³ at 468. The *Kessler* opinion cited with approval an Eighth Circuit decision which stated that:

"The provision for the [Administrator's] recovery of the overcharges themselves as damages is purely a remedial and hence a civil sanction there can be no possible doubt. And there can be but little more question that the provision for increasing or multiplying the overcharge-damages equally was intended to be simply remedial and not forfeitively punitive in nature." *Crary v. Porter, supra*, at 413-414.

As the Tenth Circuit declared in *Amoto v. Porter*, 157 F. 2d 719, 722 (C.A. 10, 1946):

"Considering the declared purposes of the Act and the interest of the Government in its enforcement, an action

²³ Compare this Court's opinion in *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C.A. 9, 1946).

for the imposition of the sanctions authorized is remedial and not penal in nature. . . .”

Of course, what is a penalty where the survival of an action is concerned is not necessarily a penalty where the Rules of Civil Procedure are applied, as in the *Kessler* case. By the same token the decisions on these diverse non-tax questions are not conclusive here. What is a penalty where survival is involved is not necessarily a penalty where taxation is involved. “A definition given for such an issue is not controlling in this dissimilar inquiry.” See *Higgins v. Commissioner*, 312 U.S. 212, 217 (1941).²⁴ Indeed, as the O.P.A. decisions illustrate, the word “penalty” is one of those “chameleon” terms “which reflect the color of their environment.” See *Commissioner v. National Carbide Corporation*, 167 F. 2d 304, 306 (C.A.2, 1948), *aff’d*, 336 U.S. 422 (1949). Like “cause of action,” it “may mean one thing for one purpose and something different for another.” See *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67, 68 (1933). For “the words ‘penal’ and ‘penalty’ have many different shades of meaning, and are in fact among the most elastic terms known to law.” *Ward v. Rice*, 29 F. Supp. 714, 715 (E.D.Pa., 1939).

The basic issue in this case has been framed by the Supreme Court in *Commissioner v. Heininger*, *supra*. The question is whether the deduction of the alleged overcharges which were turned over to the Government would frustrate any “sharply defined” Congressional or administrative policy toward overcharges. The legislative and administrative materials which we have set forth manifestly indicate that the return of alleged overcharges was not a penalty and that the deduction of the amount returned would not frustrate the national price control policy. The prime objective of the law requiring an overcharger to surrender his overcharge to the consumer or to the Administrator was to remove the overcharge from circulation and to return the overcharger to *status quo*.

²⁴ See also *Helvering v. Hammel*, 311 U. S. 504, 507 (1941); *Helvering v. Northwest Steel Rolling Mills*, 311 U. S. 46, 50-51 (1940); *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 87 (1934); *Burnet v. Guggenheim*, 288 U. S. 280, 287, 289 (1933).

C. Petitioner's Payment of the Overcharge Was An Ordinary and Necessary Business Expense

The Commissioner's rulings and the Tax Court's decisions plainly imply that, apart from public policy considerations, petitioner's payment of alleged overcharges to the O.P.A. was an ordinary and necessary business expense. Clearly the payment was "directly connected with" and "proximately resulted from" the petitioner's business. See *Kornhauser v. United States*, 276 U.S. 145, 153 (1928). The payment may have been "unique in the life of the individual . . . but not in the life of the group, the community of which he is a part." *Welch v. Helvering*, 290 U.S. 111, 114 (1933).

The Fifth Circuit has said that "the revenue laws of the United States are not over-squeamish." *Alexander Gravel Co. v. Commissioner*, 95 F. 2d 615, 616 (C.A. 5, 1938). Perhaps this generalization reaches too far in other contexts. Compare *United States v. Sullivan*, 274 U.S. 259 (1927), with *Commissioner v. Wilcox*, 327 U.S. 404 (1946).²⁵ But undoubtedly it is now a fact of business life, particularly in wartime, that the greatest effort and impeccable good faith are frequently insufficient to insure perfect compliance with complicated regulatory laws.²⁶ In our extremely complex modern business world, swarming with rules and regulations, violations are practically inevitable though intentions are the most honorable. The Emergency Price Control Act was the crowning illustration of the overwhelming complexity of business regulations. "The body of regulations, by which the United States sought to control prices during the last war, was extraordinarily complicated and difficult to comprehend. That was inevitable; the innumerable varieties of commercial transactions to be covered made possible nothing simpler." It became the business of every businessman to find his way, at his peril, through "the daedalian mazes" of statutes, regulations, orders, instructions, and forms. *Jerry Rossman Corpora-*

²⁵ See also *Commissioner v. Heininger*, *supra*.

²⁶ With respect to the Price Control Law see, e.g., *Hecht Co. v. Bowles*, 321 U. S. 321 (1944).

tion v. Commissioner, *supra*, at 714.²⁷ Legal differences with the Government became an ordinary, everyday hazard of doing business. Expenses born of such commonplace hazards are easily "ordinary and necessary" according to the "generally accepted meaning of the language." See *Commissioner v. Heining*, *supra*, at 472, 473.

D. The Penalty Doctrine Should not be Extended To This Case

We have pointed out that neither Congress nor the Administrator regarded the return of an overcharge as a penalty. In fact, they affirmatively indicated that the return of an overcharge was not a penalty.²⁸ In addition, Section 23(a) of the Code does not proscribe the deduction claimed. See *Commissioner v. Heining*, *supra*, at 473-74. Nevertheless the Commissioner disallows the deduction by invoking the so-called penalty doctrine, which has been applied by the lower Federal courts "from time to time" in disallowing the deduction of certain fines and penalties. *Id.* at 473.

As the Supreme Court has succinctly stated, "What class of outlays may, in relation to the federal income tax, be deducted from gross income and in what amount are matters solely for Congress." *McDonald v. Commissioner*, 323 U.S. 57, 59 (1944). Despite this fundamental principle the Commissioner and some courts have evolved the penalty doctrine without the benefit of any specific legislative command or any authoritative Treasury regulation.²⁹ *Great*

²⁷ Even leading officials of O.P.A. have recognized the unbelievably complicated character of the wartime price control regulations and the high probability of honest misunderstanding. See *Cavers, Simplification of Government Regulations*, 8 FED. BAR J. 339 (1947).

²⁸ See pp. 8-18, *supra*.

²⁹ Treasury Regulations 111, Sec. 29.23(a)-1, provide that "Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income." The Regulations are conspicuously silent on the general subject of fines and so-called penalties. As the Supreme Court observed in the *Heining* case, "In determining this issue we do not have the benefit of an interpretative departmental regulation defining the application of the words 'ordinary and necessary' to the particular expenses here involved." *Id.* at 470. Cf. *Textile Mills Securities Corp. v. Commissioner*, 314 U. S. 326, 338.

For a critical analysis of the penalty doctrine, see Note, 54 HARV. L. REV. 852 (1941).

Northern Ry. Co. v. Commissioner, 40 F. 2d 372 (C.A. 8, 1930), *cert. denied*, 282 U.S. 855 (1930); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C.A. 2, 1931); *Chicago, Rock Island & Pacific Ry. Co. v. Commissioner*, 47 F. 2d 990 (C.A. 7, 1931), *cert. denied*, 284 U.S. 618 (1931); *Helvering v. Superior Wines & Liquors*, 134 F. 2d 373 (C.A. 8, 1943); *Commissioner v. Longhorn Portland Cement Co.*, 148 F. 2d 276 (C.A. 5, 1945), *cert. denied*, 326 U.S. 728 (1945);³⁰ *Bonnie Bros. v. Commissioner*, 15 B.T.A. 1231 (1929).

Neither this Court nor the Supreme Court has ever held that the payment of a fine or a penalty, which otherwise qualifies as a business expense, is not deductible. Indeed, this Court's decision in *Helvering v. Hampton*, 79 F. 2d 358 (C.A. 9, 1935), reflects a determination to control the Commissioner in his efforts to rove at large beyond the confines of statute and regulation. Moreover, the reasoning and thrust of the Supreme Court's decision in *Commissioner v. Heininger*, *supra*, suggest disapproval of the Commissioner's iron-clad rule disallowing the deduction of any and all payments to the Price Administrator without regard to the underlying price control policy. Finally, the Court of Appeals for the Second Circuit, which was one of the principal architects of the penalty doctrine, has refused to extend its own rulings so as to disallow the deduction of an overcharge returned to the Government.³¹

³⁰ In *Longhorn Portland Cement Co. v. Commissioner*, *supra*, and *Burroughs Building Material Co. v. Commissioner*, *supra*, penalties and fines were paid to state governments. Public policy considerations not present here were therefore the sole determining factors in those cases.

³¹ The Second Circuit's decision in *Jerry Rossman Corporation v. Commissioner*, *supra*, carefully distinguished that Court's prior decisions in *Burroughs Building Material Co. v. Commissioner*, *supra*; *Gould Paper Co. v. Commissioner*, 72 F. 2d 698 (C.A. 2, 1934); *National Outdoor Advertising Bureau v. Helvering*, 89 F. 2d 878 (C.A. 2, 1937).

The Second Circuit's opinion in the *Rossman* case did not cite *Commissioner v. Longhorn Portland Cement Co.*, *supra*. But a few months before deciding the *Rossman* case, the Second Circuit affirmed the Tax Court *per curiam* on the authority of the *Longhorn* case. *Universal Atlas Cement Company v. Commissioner*, 171 F. 2d 294 (C.A. 2, 1948).

In the *Heininger* case the Supreme Court noted that the Commissioner and the lower courts have "narrowed the generally accepted meaning of the language" authorizing the deduction of ordinary and necessary business expenses "in order that tax deduction consequences might not frustrate sharply defined national and state policies proscribing particular types of conduct." *Id.* at 473. But at the same time the Court emphasized that "the language of 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." *Id.* at 474. We do not suggest that the silence of the revenue statutes should necessarily foreclose a sensible judicial interpretation of Section 23(a) in the public interest as reflected in other statutes. But a re-examination of the pioneer decisions on the penalty principle reveals its very slender foundation. *Great Northern Ry. Co. v. Commissioner, supra.* Moreover, as variously applied and not applied, the principle has produced very curious results.

The penalty doctrine was initially established in *Great Northern Ry. Co. v. Commissioner, supra.* In that case the United States had assessed lump sum penalties against the taxpayer for violations of the Safety Appliances Act³² and the Hours of Service Law,³³ among others.³⁴ The company sought to deduct these penalty payments as "ordinary operating expense." *Id.* at 373. The Court of Appeals for the Eighth Circuit conceded that the expenses "arose in connection with the operations of the road," but, the Court also observed, "they arose entirely from unlawful operation, prohibited specifically by statutes and regulations." Then, without attempting to support its conclusion from legislative language or history, the Court decided that: "*It cannot be* that Congress intended the carrier should have any advantage, directly or indirectly, or any reduc-

³² 36 Stat. 299 (1910), 45 U.S.C.A. §13. See note 45, *infra*.

³³ 39 Stat. 722 (1916), 45 U.S.C.A. §66. See note 45, *infra*.

³⁴ See 8 B.T.A. 225, 234, 263-265 (1927), *aff'd* 40 F. 2d 372, (C.A. 8, 1930), *cert. denied*, 282 U. S. 855 (1930).

tion, directly or indirectly, of these penalties." *Ibid.* (Italics supplied.)

The Second Circuit's decision in *Burroughs Building Material Co. v. Commissioner, supra*,—based, in part at least, upon the *Great Northern* precedent rather than Congressional direction—marked the second significant chapter in the judicial evolution of the penalty doctrine. A corporation and its president had pleaded guilty to an indictment charging violation of New York state laws prohibiting price-fixing agreements. The corporation sought to deduct the fines it had paid on behalf of itself and its president as well as attorneys' fees incurred in the criminal proceedings. Drawing what was conceded to be an "arbitrary line" between civil tort actions and criminal proceedings which involve no moral turpitude, the Court held, with apparent hesitation, that the fines were not deductible. 47 F. 2d at 180.³⁵ Moreover, said the Court, "If the fines and costs cannot be deducted, the legal expenses incurred in litigating the question whether the taxpayer violated the law and whether fines should be imposed should *naturally* fall with the fines themselves." *Ibid.* (Italics supplied). The Court concluded that it could not "sanction expenditures of such a character . . . on grounds of public policy." *Ibid.*

More recently the Second Circuit has dealt with the deductibility of counsel fees incurred in resisting a Government civil action. *National Outdoor Advertising Bureau v. Helvering*, 89 F 2d 878 (C.A. 2, 1937).³⁶ In this opinion the previous conclusions with respect to the penalty doctrine were re-examined and re-affirmed. The Court decided

³⁵ In *Burroughs Building Material Co. v. Commissioner, supra*, at 180, the Court emphasized that "It is not easy to distinguish such fines from expenditures incurred in connection with actions to recover for negligence or because of patent infringements, unless one draws an *arbitrary line* between criminal and civil actions even where the criminal actions relate to matters involving no moral turpitude. Undoubtedly expenditures which are in themselves immoral, such as for bribery of public officials to secure protection of an unlawful business would not have to be allowed in order consistently to justify a deduction of fines paid for violations of law involving no moral turpitude and practically inevitable." (Italics supplied).

³⁶ In accord: *Gould Paper Co. v. Commissioner, supra*.

that the same considerations of public policy which proscribed the deduction of fines and related expenses made non-deductible fees paid for defense against a Federal anti-trust injunction. As the Court restated the rationale of the *Burroughs* case, fines and legal expenses are not “ ‘necessary’ ” because “the law will not recognize the necessity of engaging in illegal courses in the conduct of a business. . . . (I)t is never necessary to violate the law in managing a business. . . .” *National Outdoor Advertising Bureau v. Helvering, supra*, at 881.

The Supreme Court granted certiorari in *Commissioner v. Heininger, supra*, to resolve an asserted conflict between the decision of the Seventh Circuit Court of Appeals in that case and the Second Circuit’s decision in the *National Outdoor Advertising Bureau* case. *Commissioner v. Heininger, supra*, at 470. The Supreme Court affirmed the Seventh Circuit, holding that legal fees incurred in an unsuccessful attack upon a postal fraud order were deductible. Perhaps the *Heininger* case did not overturn the *National Outdoor* decision in all its aspects. However, the *Heininger* decision certainly repudiated the theory that “public policy” requires the blanket disallowance of all expenses arising out of violations of law litigated by the Government. And the Second Circuit, along with others,³⁷ had squarely held that the same considerations of public policy which forbid the deduction of fines and penalties forbid the deduction of related expenses. Strictly speaking, the *Heininger* case may not have decided more than the precise issues presented by the facts. But that opinion abstains from any meticulous distinctions between legal expenses and fines or penalties. In its discussion of public policy, cases on expenses and cases on fines and penalties freely intermingle. 320 U.S. at 473, note 8. The opinion emphasizes that an otherwise deductible business outlay is not to be disallowed under the income tax law unless its allowance “would frustrate” some “sharply

³⁷ See, e.g., *Helvering v. Superior Wines & Liquors, supra*, and *Burroughs Building Material Co. v. Commissioner, supra*.

defined" policy deriving from some other source. *Id.* at 474. Finally, it indicates that a penalty incurred in business like other outlays incurred in business, is also deductible if the "tax deduction consequences might not frustrate sharply defined" policies "proscribing particular types of conduct." *Id.* at 473.

Hence whether the deduction in question is a fine, penalty or legal fee, no court is "required to regard the administrative finding of guilt" as "a rigid criterion" of "deductibility." *Commissioner v. Heininger, supra*, at 475. The mere fact that a payment is made because of a legal transgression is no longer controlling. To the extent that the "penalty doctrine" cases held otherwise they have been authoritatively overruled. *Ibid.* As the Second Circuit has nicely summarized the matter, "whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends upon the place of sanctions in the scheme of enforcement of the underlying act . . . in short . . . there are 'penalties' and 'penalties,' and . . . some are deductible and some are not." *Jerry Rossman Corporation v. Commissioner, supra*, at 713.

It seems clear, therefore, that the penalty doctrine does not apply here. In the first place, the return of the overcharge was not devised as a penalty and did not serve as a penalty. Secondly, even if for some reason the return of the overcharge were deemed a penalty, its place in the scheme of enforcement demonstrates that the deduction would not "frustrate" any "sharply defined" policy of the Price Control Act. See pp. 8-18, *supra*.

In ultimate analysis the Government's view rests on the convenient notion that any payment to the Government in the enforcement of a statute is necessarily a penalty because of its deterrent effect. But any sanction imposed by law has a deterrent effect whether payment is made to the Government or to some individual. When legal transgressions occur, the same public policy is at stake no matter who invokes the law. The courts have uniformly held that

taxpayers may deduct damages paid to a private person in order to right a wrong committed in the operation of a business. It has been deemed immaterial whether the injury was caused by mere negligence, conspiracy, misrepresentation or violation of State or Federal statute. See *Howard v. Commissioner*, 22 B.T.A. 375 (1931); *International Shoe Co. v. Commissioner*, 38 B.T.A. 81, 95 (1938). See also *Foss v. Commissioner*, 75 F. 2d 326 (C.A. 1, 1935); *Kornhauser v. United States*, *supra* at 153. As this Court has said, "We cannot agree that private wrongdoing in the course of business is extraordinary. . . ." *Helvering v. Hampton*, *supra*, at 360. In short, legal transgressions are quite ordinary business hazards. Cf. *Welch v. Helvering*, *supra*, at 114-115.

Obviously, whether a payment is a penalty depends upon the setting and consequences of the payment. Even the Commissioner has refrained from applying any wooden rule that any payment to the Government is necessarily a penalty. For example, the Agricultural Adjustment Act of 1938 authorized the imposition of farm marketing quotas. Section 314 of that Act subjected every farmer who marketed for example tobacco products in excess of the quota to a sanction specifically called a "penalty," measured by the value of his sales beyond the allotted quota. 52 Stat. 48 (1938), 7 U.S.C.A. §1314 (1939). The Bureau has ruled that such "penalties" are deductible as ordinary and necessary business expenses. I.T. 3530, C.B. 1942-1, p. 43.³⁸

The Commissioner's own rulings on returned overcharges are a revealing commentary on the mechanical notion that any payment to the Government in the enforcement of a

³⁸ The Agricultural Adjustment Act did not expressly characterize sales in excess of established quotas as unlawful, whereas the Price Control Law declared overcharging unlawful. Accordingly, it might be argued that this technical distinction destroys the force of the A.A.A. deduction analogy. But this distinction is at best very attenuated. It does not conceal the overriding design of the A.A.A. penalty to compel compliance with the established quotas. See, e.g., *Mulford v. Smith*, 307 U. S. 38, 41 (1939). The allowance of the tax deduction necessarily mitigated the impact of A.A.A. policy and the only sanction provided for its enforcement. Moreover, as we have pointed out, the return of overcharges is not the payment of a penalty.

legal sanction is necessarily a penalty. For on the basis of this notion the Commissioner has proceeded to impose strange and anomalous consequences which are not responsive to any rule of reason. See I.T. 3627, C.B. 1943, p. 111; I.T. 3799, C.B. 1946, p. 56. Section 4(a) of the Emergency Price Control Act made all overcharging illegal—whether the overcharge was ultimately returned to the consumer or to the O.P.A. The consumer action was no less designed as a deterrent than the civil action which the Administrator was authorized to bring. The rulings distinguishing a payment to a consumer from a payment to the Administrator rely entirely upon the “arbitrary”³⁹ distinction which the lower courts have drawn between actions instituted by the sovereign and actions instituted by private parties.⁴⁰ Under the Commissioner’s rulings overcharges are deductible if they are paid to consumers, but identical overcharges are not deductible if they are paid to the Government. Nor is this anomaly less glaring when we note that the Commissioner permits a wilful overcharger to deduct a treble damage payment to a consumer while he prohibits the inadvertent overcharger from deducting the mere payment of the overcharge to the Government.

The present confusion is not alleviated by simply saying that the deductibility of payments made to consumers is not involved here.⁴¹ The Commissioner has not only allowed the deduction of these payments. He has also allowed the deduction of legal fees incurred in defending suits by the Price Administrator or consumer—whether or not the de-

³⁹ See *Burroughs Building Material Co. v. Commissioner*, *supra*, at 180.

⁴⁰ See p. 25, *supra*. The fine distinction drawn by the Commissioner between the consumer’s action and the Administrator’s action is contradicted by the authoritative literature on O.P.A. policy. This Court has observed that “The purchaser plaintiff in bringing his action is the instrument in accomplishing the Congressional purpose of preventing inflation.” See *Porter v. Crawford & Doherty Foundry Co.*, *supra*, at 434-435. “This action is the people’s remedy against inflation.” Sen. Rep. 922, 78th Cong., 2d Sess. (1944) 13-14. In short, the buyer’s civil action was no less—and no more—an enforcement weapon than the Administrator’s parallel action.

⁴¹ In *Scioto Provision Co.*, *supra*, the Tax Court refused to undertake an analysis of the curious distinction drawn by the Commissioner. 9 T.C. at 445.

fense is successful.⁴² Accordingly both these phases of the Commissioner's understanding of the penalty doctrine will never be squarely presented to the courts. But this situation should not foreclose an analysis of related aspects of the Commissioner's rules, where, as here, his rules supposedly derive from judge-made public policy which the Tax Court has affirmed. The administrative rulings based on the penalty doctrine reach arbitrary and irreconcilable results. If the penalty doctrine has been so administered as to be beyond repair by the courts which created it, the doctrine should be abandoned. In any event the doctrine should certainly not be extended to disallow the deduction of a payment which was not considered punitive by the authorities who collected it.

If the penalty doctrine is to survive, its scope should be reasonably circumscribed. In view of the illuminating legislative and administrative history, to which we have referred,⁴³ the mere fact that an overcharge was paid to the Government rather than the consumer is irrelevant in drawing the appropriate boundary lines. Moreover, the 1944 amendment, when appraised in the context of that history and the *Heininger* opinion, indicates that the return of an overcharge lies well beyond these lines. For in requiring the return of the overcharge Congress did not impose a penalty, and in allowing the deduction of the overcharge the courts are not frustrating any sharply defined price control policy.⁴⁴

E. Disallowance of Petitioner's Deduction Would Affirmatively Impose a Penalty

We have seen that the return of an overcharge to the Government is not a penalty so far as Price Control policy is concerned. There is a further reason why the penalty doctrine should not be extended to bar the deduction of an

⁴² G. C. M. 24810, C.B. 1946-1, p. 55.

⁴³ See pp. 8-18, *supra*.

⁴⁴ See pp. 5-18, *supra*.

overcharge payment to the Government. As applied to such payments the doctrine would affirmatively inflict a penalty which Congress did not impose rather than mitigate a penalty which Congress had otherwise imposed.

We have already pointed out the important lesson of the *Heininger* case: the underlying statute whose alleged violation precipitates the questioned payment is the principal criterion in determining the deductibility of the payment. Each of the statutes involved in the cases fashioning the penalty doctrine required the violators to make lump sum payments of fines or penalties to the Government which bore no relation to their incomes. See, e.g., *Longhorn Portland Cement Co. v. Commissioner, supra*.⁴⁵ The taxpayers'

⁴⁵ *Longhorn Portland Cement Co.* settled a complaint charging violation of the Texas anti-trust statute. Article 7436 of that statute, 20 Tex. Civ. Stat. Art. 7436 (Vernon, 1929), provided that "Each . . . corporation or association . . . who shall in any manner violate any provision of this subdivision shall, for each day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the State of Texas." *Longhorn Portland Cement Co. v. Commissioner*, 3 T.C. 310, 311 (1944), *rev'd in part*, 148 F. 2d 276 (C.A. 5, 1945), *cert. denied*, 326 U. S. 728 (1945).

Superior Wines & Liquors, Inc. settled administratively an alleged violation of Section 2857 of the Internal Revenue Code. That Section and its supporting regulations require liquor dealers to maintain certain records. The Section further provides that "every . . . dealer who refuses or neglects to keep . . . records in the form prescribed by the Commissioner . . . shall pay a penalty of \$100 and, on conviction, shall be fined not less than \$100 nor more than \$5,000 and be imprisoned not less than three months nor more than three years." *Helvering v. Superior Wines & Liquors, supra*, at 373-374. *Superior* paid \$2,250 in settlement. This sum can only be allocated as \$100 penalty and \$2,150 fine.

The *Burroughs Building Material Co.* pleaded guilty to an indictment drawn under Section 341 of the General Business Law of New York. 19 Consol. Laws, N.Y. §341 (McKinney, 1941). *Burroughs Building Material Co. v. Commissioner, supra*, at 178. That Section provided that every corporation convicted pursuant to that statute "is guilty of a misdemeanor" and shall be punished "by a fine of not exceeding twenty thousands dollars." *Burroughs* paid a fine of \$2,500.

The Chicago, Rock Island & Pacific Railway had violated the Federal Safety-Appliance Law, the Hours of Service Law, the Transportation of Live Stock Law, and the Quarantine Law. *Chicago, Rock Island & Pacific Ry. v. Commissioner, supra*, at 991.

The Safety Appliance Law provided that "any common carrier . . . hauling . . . any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of \$100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States . . ." 27 Stat. 532 (1893), 29 Stat. 85 (1896), 45 U.S.C.A. §6 (1943). See also 36 Stat. 299 (1910), 45 U.S.C.A. §13 (1943).

The Hours of Service Law provided that "Any person violating any provision of section 65 of this title shall be guilty of a misdemeanor and upon conviction

unlawful conduct did not increase their intake by any specific amount. In appraising the demands of public policy, the courts in those earlier cases evidently felt, therefore, that the deduction of amounts paid to the Government would enable violators to pay the Government with one hand and to offset their payment against their unrelated tax liability with the other.⁴⁶

In contrast, the Price Control Act had a very real and direct relation to the taxpayer's income, for it limited the taxable income which might be lawfully received. If the taxpayer received an additional amount, he was obliged to return the excess to the Price Administrator or the consumer. The very transgression which yielded the excess required the taxpayer to return the excess. And, as we have seen, the obligation to return the overcharge was not the infliction of a penalty but a means of preventing unjust enrichment. Hence the taxpayer's business income is not truly and accurately reflected unless the returned overcharge is deducted as an amount received and paid over in the course of its business. *Cf. Commissioner v. Brown*, 54 F. 2d 563 (C.A. 1, 1931). The Supreme Court's admonition in *Higgins v. Smith*, 308 U.S. 473, 476-477 (1940), is especially appropriate here: "There is no illusion about the

shall be fined not less than \$100 and not more than \$1000, or imprisoned not to exceed one year, or both." 39 Stat. 722 (1916), 45 U.S.C.A. § 66 (1943).

The Transportation of Live Stock Law provided that "any railroad . . . who knowingly and wilfully fails to comply with the provisions of . . . this title shall for every such failure be liable for and forfeit and pay a penalty of not less than \$100 nor more than \$500." 34 Stat. 608 (1906), 45 U.S.C.A. § 73 (1943). It was further provided that "The penalty created by section 73 of this title shall be recovered by civil action in the name of the United States in the district court . . . and it shall be the duty of United States attorneys to prosecute all violations of this chapter. . . ." 34 Stat. 608 (1906), 36 Stat. 1167 (1911), 45 U.S.C.A. § 74 (1943).

The Quarantine Act concerning Nursery Stock provided that "Any person who shall violate any of the provisions of this chapter . . . shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both, . . ." 37 Stat. 318 (1912), 7 U.S.C.A. § 163 (1939). See also Quarantine Act concerning Cattle and Poultry, 23 Stat. 32 (1884), 21 U.S.C.A. § 117 (1927).

Violation of these same statutes gave rise to the payments in controversy in *Great Northern Ry. v. Commissioner*, *supra*. (Italics supplied.)

⁴⁶ See *Great Northern Ry. Co. v. Commissioner*, *supra*; *Chicago, Rock Island & Pacific Ry. Co. v. Commissioner*, *supra*; *Helvering v. Superior Wines & Liquors Co.*, *supra*.

payment of a tax exaction. Each tax, according to a legislative plan, raises funds to carry on government. The purpose here is to tax earnings and profits less expenses and losses. If one or the other factor in any calculation is unreal, it distorts the liability of the particular taxpayer to the detriment or advantage of the entire tax-paying group."

Indeed if the deduction is disallowed, as the Government contends, the taxpayer will be affirmatively penalized by the tax laws. For he not only surrenders the overcharge, but is then taxed on the overcharge as if it had never been surrendered. This penalty is inevitable in view of the Government's elastic attitude toward overcharges. The Government insists that it alone is entitled to the overcharge, which the taxpayer must return in order to prevent unjust enrichment. The Government also insists that the taxpayer is taxable on the overcharge, though he is obliged to pay it over to the Government as soon as he receives it. The Government then insists that the taxpayer may not deduct the overcharge though he was not entitled to the overcharge. Hence it is not surprising that the Government's view of the matter would subject the inadvertent overcharger to harsher treatment than an embezzler or thief. See *Commissioner v. Wilcox*, *supra*. One should be slow to attribute such strange tax consequences to Congress—especially if no tax statute requires these consequences.

In returning the overcharge the petitioner did not pay a penalty. Nor, as we have seen, would the deduction of the overcharge "frustrate" any "sharply defined" policy of the Price Control Act. The disallowance of the deduction would tax petitioner as if it were truly enriched, although taxation is an "eminently practical" matter, *Tyler v. United States*, 281 U.S. 497, 503 (1930), wisely concerned with economic substance. Instead of mitigating a penalty, the disallowance of the deduction would, as in the *Heininger* case, affirmatively "attach a serious punitive consequence" to the return of an overcharge, which overriding national policy did not devise as punishment. See *Commissioner v.*

Heininger, supra, at 474. If the tax laws do not mitigate penalties, neither do they impose penalties—at least until they expressly so provide.⁴⁷

Respectfully submitted,

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⁴⁷ *Cf.* Section 5(a), Stabilization Act of 1942, 56 Stat. 767 (1942), 50 U.S.C.A. §965(a). See note 7, *supra*.

**In the United States Court of Appeals
for the Ninth Circuit**

**NATIONAL BRASS WORKS, INC., A CORPORATION,
PETITIONER**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12,295

NATIONAL BRASS WORKS, INC., A CORPORATION,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion (R. 79-83) is the memorandum opinion of the Tax Court which is not reported.

JURISDICTION

This petition for review involves federal income taxes for the year 1944. (R. 85-92.) On January 21, 1947, the Commissioner of Internal Revenue mailed to taxpayer a notice of deficiency in income tax in the amount of \$2,911.85 for the calendar year ending December 31, 1944. (R. 2, 8-11.) Within ninety days thereafter and on April 4, 1947, taxpayer filed a petition with the Tax Court for redetermination of the deficiency under

the provisions of Section 272 of the Internal Revenue Code. (R. 2-7, 11.) The final order and decision of the Tax Court, determining that there is a deficiency on the part of taxpayer in income tax of \$2,911.85 for the year 1944, was entered on March 25, 1949. (R. 84.) The case is brought to this Court by taxpayer's petition for review filed June 3, 1949 (R. 85-92), within three months after the Tax Court's decision was rendered, pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948, and Section 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the sum of \$13,071.08, paid by taxpayer to the Treasurer of the United States in settlement of the Price Administrator's claim for treble damages on account of wilful violations of price ceiling regulations adopted by the Office of Price Administration under the Emergency Price Control Act of 1942, was deductible as an ordinary and necessary business expense in computation of taxpayer's income tax for the calendar year 1944.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appendix, *infra*.

STATEMENT

The case was submitted to the Tax Court on a stipulation of facts. (R. 13-17.) The Tax Court adopted this stipulation in toto as its findings of fact (R. 79), and specifically set forth as pertinent in its memorandum opinion the following parts of the stipulation:

Taxpayer is a corporation which keeps its books and files its tax returns on the accrual basis. Its 1944 return was filed at Los Angeles, California. (R. 79.)

The tax in controversy is its income tax for the calendar year 1944, in respect to which the Commissioner had determined a deficiency in the amount of \$2,911.85. During this period taxpayer was engaged in the business of making and selling non-ferrous castings of brass and bronze alloy. (R. 80.)

Under the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, the Office of Price Administration was empowered to regulate the selling prices of certain products, including non-ferrous castings and the brass and bronze alloy ingots from which such castings were made. The Office of Price Administration promulgated Price Regulation 202, dated August 13, 1942, effective August 19, 1942, which regulated the selling prices of brass and bronze alloy ingots and provided, in part, as follows (R. 80):

Sec. 1309.151. On and after August 10, 1942, regardless of any contract * * * no person shall sell * * * at a price higher than the maximum price established * * *.

Said Regulation 202 further provided (R. 80-81):

Sec. 1309.165—Appendix A. Maximum prices for brass and bronze alloy ingot. (a) Delivery charges. The maximum prices herein established for brass and bronze alloy ingot include transportation costs to any destination within the continental United States not exceeding 25 cents per hundred weight. Actual transportation costs in excess of those so included may be charged to, and paid by, the buyer.

Regulation 202 thereafter set forth a schedule of maximum prices for various classifications of brass and bronze alloy ingots. (R. 81.)

Taxpayer at all times material purchased its requirements of brass and bronze alloy ingots from H. Kramer & Company, Chicago, Illinois. (R. 81.)

The Office of Price Administration promulgated Revised Maximum Price Regulation 125 (hereinafter sometimes referred to as RMPR 125) dated January 27, 1943, effective February 1, 1943, which established maximum selling prices of non-ferrous foundry products. (R. 81.)

RMPR 125 reduced taxpayer's maximum selling prices one and one-half cents per pound for the castings involved herein effective February 1, 1943. (R. 81.)

Taxpayer was furnished a copy of this Revised Maximum Price Regulation 125 and was aware of its provisions. Taxpayer did not reduce its prices to its customers as required by said RMPR 125. (R. 15, 81.)

Two O.P.A. investigators appeared at taxpayer's office in the spring of 1944 and examined its books. As a result of this examination, the Office of Price Administration alleged that taxpayer had violated RMPR 125. In order to settle the O.P.A. claim, taxpayer issued its check, dated July 14, 1944, made payable to the order of the Treasurer of the United States in the amount of \$13,071.08 (R. 81), and was given a receipt therefor reading as follows (R. 82):

Receipt

Received this 17th day of July, 1944 check No. 3539-E dated 7/14/44 in the sum of \$13,071.08, payable to the Treasurer of United States, from National Brass Works, Inc., of Los Angeles, California, in settlement of the Administrator's Claim for treble damages on account of violations of ceiling prices for non-ferrous castings under RMPR 125.

(S.) WM. H. BUCKINGHAM,
Enforcement Attorney.

In 1944 taxpayer accrued on its books this sum of \$13,071.08 as a business expense and deducted it in computing its income for federal income tax purposes. The Commissioner, in his statutory notice of deficiency, dis-

allowed this deduction with the following explanation (R. 82):

(a) It is held that an item in the amount of \$13,071.08, representing "Settlement of administrator's claim for treble damages on account of violation of ceiling prices," and deducted by you in your income tax return for the taxable year 1944, is not deductible from gross income within the meaning of section 23 (a) or (f) of the Internal Revenue Code.

This disallowance by the Commissioner gave rise to the instant appeal, and the allowability of the claimed deduction is the only issue involved here. (R. 82.)

The amount of \$13,071.08 was based upon sales made by the taxpayer, at prices in excess of the maximum prices established under RMPR 125, and which sales had been made during the period February 1, 1943, to January 31, 1944, to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205 (e) of the Emergency Price Control Act of 1942. (R. 82-83.)

The Tax Court explicitly made the following ultimate fact finding (R. 83):

The payment of \$13,071.08 which was made to the O.P.A. in compromise of the Price Control Administrator's claim for treble damages was not an ordinary and necessary business expense of the taxpayer within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code. (R. 83.) Accordingly, the Tax Court decided that there was a deficiency in taxpayer's income tax of \$2,911.85 for the year 1944. (R. 84.)

SUMMARY OF ARGUMENT

A. Taxpayer's conceded violations of the ceiling price regulation, promulgated under the Emergency Price Control Act of 1942, were knowing and intentional. Taxpayer expressly stipulated that it was furnished a

copy of the price regulation and was aware of its provisions, and did not reduce its prices to its customers as required by the regulation. Thus, the factual situation here is in striking contrast to that involved in *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711, the decision of the Court of Appeals for the Second Circuit upon which taxpayer principally relies. There, the overcharges and violations were concededly unintentional. The alleged circumstance, even if true, that taxpayer's supplier had not reduced its net prices to taxpayer to the same extent as the ceiling price regulation required taxpayer to reduce its prices to its customers constituted no justification for taxpayer's wilful violation of law nor authorized it by self-help to obtain a competitive advantage. Taxpayer's remedy was not to flaunt the regulation, but to file a protest with the Administrator and in the event the protest was overruled, to adjudicate the question before the Emergency Court of Appeals. Again, quite unlike the *Rossman* case, where taxpayer itself discovered it had unwittingly overcharged its customers and voluntarily reported the situation to the Office of Price Administration, here it is admitted that the overcharges were only discovered as a result of the examination of taxpayer's books by O.P.A. investigators, and the \$13,071 was paid to the United States expressly in settlement of the Administrator's claim for treble damages on account of violations of ceiling prices.

Furthermore, there is no proof in the instant record that the sum paid to the United States did not include an amount in excess of the overcharges. The burden was upon taxpayer in the Tax Court, not merely to overcome the presumptive correctness of the Commissioner's determination, but further to sustain the burden of persuasion to establish the facts and its right to the alleged deductions. In the *Rossman* case, on the other hand,

the payment to the United States was shown to have been limited to the overcharges.

B. The payment sought to be deducted was made in settlement of a cause of action to impose a penalty for commission of acts violative of a sharply defined national policy to stabilize commodity prices so as to prevent wartime inflation and profiteering and their disruptive causes and effects. Inflation was stated by a Congressional Committee which recommended the legislation to be the most destructive of all the consequences of war, except human slaughter. By Section 205 (e) of the Emergency Price Control Act, Congress purposed as one means towards accomplishment of this sharply defined national policy to impose a money penalty as a deterrent upon wilful violators and the \$13,071 paid here to the United States was paid *qua* penalty in settlement of such a sanction. In practice the principal sanction afforded by Section 205 (e) was the Administrator's suit; the consumer's right of action was limited and was the incident, not the rule. Thus, the section provided a double sanction, in one part penal and in another, remedial. The sum recovered by the United States clearly was not intended for compensation, for the United States suffered no loss whatsoever, but was in the nature of an exaction to be levied upon taxpayer as a penal deterrent.

C. The decisions of this Court and other courts establish that the *Rossman* case is incorrect in its holding that the Administrator's claim to recover the overcharge is a claim substituted for that of the "terminal buyer" for "restitution" and that Congress did not intend a penalty. For example, even the terminal buyer was authorized to recover triple damages in cases where he had not paid the overcharge and had thus suffered no actual loss. In any event, actions by the Administrator on behalf of the United States bore no color whatsoever of "restitu-

tion". Single damages were no more paid in compensation to the United States than multiple damages. The United States suffered no loss in any amount and every dollar paid to it was an exaction. The wrong which Congress intended the Price Administrator to redress was assuredly a public, not a private wrong. Moreover, the sum paid to the United States for the ceiling price violations was not proved by taxpayer here to have been limited to the amount of the overcharge, and hence, even under the *Rossman* holding, taxpayer has not established that the amount sought to be deducted did not include a penal sum.

Nor, as suggested in the *Rossman* case, was the Administrator's claim to the overcharge based upon a right of appropriation by the sovereign to *bona vacantia* in cases where the terminal buyer was inaccessible. *Bona vacantia*, like escheat, applies to specific property, title in which formerly was vested in some individual. Under Section 205 (e), a terminal buyer's right of action might never come into existence, and indeed, in a majority of cases never arose. Thus, there was no unclaimed property here (or in a typical case) belonging to any unknown individual, which Congress could have intended, by means of the ^{Administrator's} ~~taxpayer's~~ right of action under Section 205 (e), to appropriate as *bona vacantia*.

Finally, any such right of appropriation must lie, not in the United States, but in the several states, since the property supposed to be appropriated is located, if anywhere, in the several states and belonging to their residents. For the purpose of application of the doctrine of *bona vacantia*, certainly the several states and not the United States are respectively the sovereign in whose favor the rule runs.

D. Under well settled principles, the effectiveness of a penalty imposed may not be impaired through dis-

allowance as a deduction in computing income taxes. The intent of Congress was to enforce the public policy by exaction of the entire penal sum, not a discounted amount. In application of this rule, no distinction can properly be made between "penalties" and "penalties", as suggested in the *Rossman* case. The amount of the penalty fixed by Congress is a binding legislative measure of the appropriate sanction. Congress thereby supplies the full penal consequence of the violation of the law; surely it is not the function of taxpayers, the Treasury and the courts to decide that in one case a discount should be permitted by indirection as an incident of tax collection, and in another case the discount should be denied. Indeed, such a rule seems incapable of practicable administration, and it is difficult to believe that Congress could have intended such an interpretation. The Supreme Court in *Commissioner v. Heininger*, 320 U. S. 467, confirms the Commissioner's contention here. Although many courts have applied the controlling principle, no other case, except the recent *Rossman* decision, had permitted tax deduction of a payment concededly penal. In any event, the *Rossman* decision is also distinguishable factually from the instant case in that there the violation was concededly unintentional, while here it was knowing and wilful, and there the payment to the United States did not exceed the amount of the overcharge, while here taxpayer has not proved that its payment to the United States was limited to the overcharge.

Administrative rulings denying deductibility of payments made to the United States for violation of Section 205 (e) of the Emergency Price Control Act have consistently supported the Commissioner's position here. Moreover, in the enforcement of the emergency price legislation, the exaction of the overcharge from price violators was considered a penalty by the authorities who collected it.

Again, payment of such a penalty is not properly a business expense and the Tax Court's construction of the words "ordinary and necessary" with respect to this payment and their proximate relation to the business here is certainly permissible. Deductions as grants made in the exercise of legislative grace must not be perverted to frustrate national policy, and the Tax Court did not err here in interpreting the language of the statute to prevent such misuse.

Indeed, even on the distinction taken in the *Rossman* case, the penalty paid here for wilful violations should be denied as a tax deduction, since allowing it clearly will frustrate the policy of Congress proscribing profiteering in time of national emergency.

ARGUMENT

The Sum Paid to the United States in Settlement of the Price Administrator's Claim for Treble Damages on Account of Taxpayer's Wilful Violations of Ceiling Prices Was Properly Held Not Deductible as an Ordinary and Necessary Expense of Taxpayer's Business

A. Taxpayer's conceded violations of the ceiling price regulation promulgated under the Emergency Price Control Act of 1942 were knowing and intentional and taxpayer failed to establish that the sum exacted by the United States in settlement did not include an amount in excess of the overcharge

The facts are not in dispute. Indeed, the case was submitted on a stipulation of fact and the Tax Court's findings are thus based on taxpayer's own admissions. (R. 79.) To summarize the pertinent facts, taxpayer has conceded and the Tax Court has found that during the period involved, under the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23 (Appendix, *infra*), the Office of Price Administration was em-

powered to regulate the selling prices of non-ferrous brass and bronze alloy castings, in the business of making and selling which taxpayer was engaged. (R. 13, 80.) By Revised Maximum Price Regulation 125, effective February 1, 1943, the Office of Price Administration established such maximum selling prices for taxpayer's products and, in particular, for the castings here involved admittedly "reduced petitioner's [taxpayer's] maximum selling prices one and one-half cents per pound". (R. 15, 81.) Indeed, taxpayer has explicitly stipulated that it "was furnished a copy of said RMPR 125 and *was aware of its provisions*" (italics supplied), and taxpayer "*did not reduce its prices* to its customers as required by said RMPR 125" (italics supplied). (R. 15, 81.)

Thus, the factual situation here is in striking contrast to that which the Second Circuit Court of Appeals passed on in *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711, 712, upon which taxpayer principally relies. Here the overcharges and violations were concededly deliberate. Not only did taxpayer instantly fail to take practicable precautions against the occurrence of violation, but on the contrary knowingly and wilfully overcharged, and the sum of \$13,-071.08 which it paid in order to settle the O.P.A. claim was concededly (R. 16, 82-83)—

based upon *sales* made by petitioner [taxpayer], *at prices in excess of the maximum prices established under RMPR 125*, which sales were made during the period February 1, 1943 to January 1, 1944, * * *. (Italics supplied.)

This was no instance of a violator "for whom the daedalian mazes of the regulations had proved too much" (*Jerry Rossman Corp. v. Commissioner, supra*, p. 714) but of a knowing violator who on the face of its own statement wilfully and deliberately presumed

to impose its own judgment over the public authority duly constituted by Congress for determining during war and inflationary emergency the selling price of the products involved. The standards which Congress prescribed in the public interest to guide the Administrator's exercise of his authority to fix prices of course did not necessarily reflect the private financial interest of any particular corporation. These are stated by the Supreme Court in *Yakus v. United States*, 321 U. S. 414, 420:

By § 2 (a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

Certainly, taxpayer in fixing its own prices in excess of those prescribed by the regulations "given the force of law" (*Yakus v. United States, supra*, p. 435) was not interested in what was generally fair and equitable and would effectuate the purposes of the Act. Clearly, the alleged circumstance, even if true, that taxpayer's supplier, H. Kramer & Company, had only reduced its net price to taxpayer by three-fourths cent per pound or less from August 1942 on,¹ whereas RMPR 125 re-

¹ Moreover, the record by no means establishes the assertion that the net reduction to taxpayer by its source, H. Kramer & Company, in metal ingot cost was only one-half to three-fourths cent per pound. (Br. 3.) Indeed, the Tax Court made no finding to that effect, although requested by the taxpayer. Apparently, taxpayer relies on Joint Exhibits 1-A, 2-B and 3-C, attached to the stipulation. (R. 14-15.) However, these exhibits establish at most that between August 11, 1942 (Inv. 17515), and August 28, 1942 (Inv. 17732), H. Kramer & Company began stamping their invoices thus: "The above prices include 0.75¢ per pound to apply on transportation costs in excess of 0.25¢ per pound. Carload freight rate from

quired taxpayer to reduce its prices one and one-half cents per pound, constitutes no justification nor "mitigating circumstances" (Br. 3, R. 88-89) for taxpayer's conceded and knowing violation of law, or authorized it by self-help to obtain a competitive advantage.² As the *Yakus* case establishes (pp. 427-431), taxpayer's remedy was not to flaunt the regulations having the force of law, but to file a protest with the Administrator against the regulations and in the event the protest was overruled, to adjudicate the question before the Emergency Court of Appeals. Indeed, the *Yakus* case ruled that at least before their invalidity had been adjudicated by recourse to this procedure prescribed by the statute, the validity of the Administrator's regulations was not subject to attack even in criminal prosecutions for their violation. Surely, taxpayer may not attack them in this proceeding. Citing the *Yakus* case, this Court held in *Shyman v. Fleming*, 163 F. 2d 461, 464: "Such an attack is cognizable only in a proceeding in the Emergency Court."

Chicago to Los Angeles \$1.17 per cwt." A careful analysis of all the invoices which are in evidence reveals that only five different kinds of ingots were sold, *both before and after* August 19, 1942, from which a comparison can be made. On three kinds of ingots the prices were reduced a net of 75¢ per hundredweight and on the other two kinds of ingots, the prices were reduced a net of 50¢ per hundredweight. But see Invoice 17732, dated August 28, 1942 (Joint Ex. 1-A), the first item on which is 358 "Commercial 88-10-2 Ingot (215) 'N'" at \$17.75 and the third item on which is 95 "Commercial 88-10-2 Ingot (215) 'N'" at \$17.25. That shows a variance of 50¢ per hundredweight on the same kind of ingot on the same date and on a single invoice.

² Again, amendment to the price ceiling regulation RMPR 125, effective February 1, 1944, after the date of all over-ceiling sales here involved, is wholly immaterial and irrelevant to the issue here. (R. 16-17, Br. 2.) As already stated, the sum of \$13,071 paid by taxpayer to the United States was based upon its sales made during the year February 1, 1943, to January 31, 1944, all made in excess of maximum prices then in effect established under RMPR 125. (R. 15, 82-83.)

Moreover, quite unlike the *Rossman* case, where taxpayer itself discovered that it had unwittingly overcharged its customers and (*Jerry Rossman Corp. v. Commissioner, supra*, p. 711)—

Although the Office of Price Administration had not started any investigation of the taxpayer's charges and had not until then undertaken to investigate them, its president asked the advice of the Office as to what he should do

here it is admitted "Two O.P.A. investigators appeared at petitioner's office in the spring of 1944 and examined its books" (R. 15), and as a result of this examination the O.P.A. alleged that taxpayer had violated RMPR 125, an allegation the truth of which, as already noted, is here admitted (R. 15-16, 81-83). Again, in the *Rossman* case, no charge was ever made against the taxpayer there by the Office of Price Administration; indeed, the official to whom taxpayer's president there went (pp. 711-712)—

suggested that he return the overcharges to the customers; but this was altogether impracticable.

* * * For these reasons the official consented that the taxpayer should settle the whole matter by paying the gross overcharge to the United States in one sum * * *.

Here, on the other hand, the \$13,071 was paid to the United States as a result of investigation by the Government of taxpayer's books, after taxpayer had wilfully violated the regulations for a period of at least a year and was expressly paid (R. 16, 82)—

in settlement of the Administrator's Claim for *treble damages on account of violations of ceiling prices* for non-ferrous castings under RMPR 125. (Italics supplied.)

Furthermore, taxpayer concedes in its brief here (pp. 3, 7), that there is no proof in the instant record

that the \$13,071 paid to the United States did not include a sum in excess of the overcharges. Clearly, the burden was upon taxpayer in the Tax Court, not merely to overcome the presumptive correctness of the Commissioner's determination, but further to sustain the burden of persuasion to establish the facts and its right to the alleged deductions. *Helvering v. Taylor*, 293 U.S. 507, 514-515; *Boehm v. Commissioner*, 326 U. S. 287, 294, rehearing denied, 326 U. S. 811. In the *Rossman* case, on the other hand, the payment to the United States was shown to have been limited to the overcharge.

B. The payment sought to be deducted was made in settlement of a cause of action to impose a penalty for commission of acts violative of a sharply defined national policy

That the Emergency Price Control Act of 1942 represented a sharply defined national policy is scarcely open to question. In *Hecht Co. v. Bowles*, 321 U. S. 321, 331, the Supreme Court, quoting from the report of the Senate Committee on Banking and Currency, which had recommended the enactment (S. Rep. No. 931, 77th Cong., 2d Sess., p. 2), stressed "the Congressional admonition that 'of all the consequences of war, except human slaughter, inflation is the most destructive' ". The Supreme Court further explained in *Yakus v. United States*, 321 U. S. 414, 431-432:

The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act, that there was grave danger of wartime inflation and the disorganization of our economy from excessive price rises,

See also S. Rep. No. 931, *supra*, p. 3, quoted in the footnote.³

In passing this statute, Congress acted in pursuance of a sharply defined policy, namely, to stabilize commodity prices so as to prevent wartime inflation and profiteering and their disruptive causes and effects. *Yakus v. United States*, *supra*, p. 423. This policy was expressly spelled out in Section 1 (a) of the Act, as also quoted and summarized by the Supreme Court in the *Yakus* case (p. 423):

Section 1 (a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war," and that its purposes are: "to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; . . . *"

³ S. Rep. No. 931, *supra*, p. 3:

* * * the swiftly moving pace of war, with evidences of inflation already apparent, leaves little time for the luxury of experiment. The need for price stability is urgent. The cost of living must be stabilized.

The committee has largely accepted the substantive provisions of the House bill, but regards prompt enactment of this stronger bill as imperative to the safety of our country.

Moreover, the statute not only stated the legislative objectives but Congress there (*Yakus v. United States, supra*, p. 423) :

prescribed the *method of achieving that objective—maximum price fixing * * **, and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power and the particular prices to be established. (*Italics supplied.*)

For either a seller or a buyer (except a consumer) to violate a maximum price regulation promulgated under the Act was made unlawful. Under the heading "Prohibitions", Congress prescribed (Emergency Price Control Act, *supra*, Section 4 (a)) :

Sec. 4 (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

In the instant case, taxpayer during the period of the entire year commencing February 1, 1943, and ending January 31, 1944 (R. 15-16, 81-83), precisely when the war emergency was at its height and the disruptive influences of inflation most serious, committed wilful violations of the maximum prices fixed by law and knowingly entered into a course of conduct which

tended to defeat the congressional objective and the chosen method for achieving that objective, namely, to protect the nation from that inflation, which, as has been seen, the Senate Committee regarded as the most destructive consequence of war except human slaughter. We contend that Congress fully purposed, as one means towards accomplishment of this sharply defined national policy, to impose a money penalty as a deterrent upon wilful violators and that the \$13,071 paid here to the United States was paid *qua* penalty in settlement of such a sanction.

Section 205 of the Emergency Price Control Act set forth the provisions for its enforcement. These included injunctive relief, whenever in the judgment of the Administrator present or threatened violations existed (Section 205 (a)); criminal penalties against any person wilfully violating the provisions of Section 4 (Section 205 (b)); the licensing of the sale of any regulated commodity whenever in the judgment of the Administrator such action was necessary to effectuate the purpose of the Act (Section 205 (f)). Finally, Section 205 (e) (Appendix, *infra*), as originally enacted, fashioned an action for \$50 or treble the amount of the overcharge, whichever was the greater, against anyone selling a commodity in violation of a maximum price order. This right of action was conferred upon persons who bought such commodities “for use or consumption *other than* in the course of trade or business”. (Italics supplied.) In all other cases the Administrator was authorized to bring the action on behalf of the United States.

During the period instantly involved, Section 205 (e) was applicable in amended form as enacted by Section 108 (b) of the Stabilization Extension Act of 1944, c. 325, 58 Stat. 632 (50 U.S.C. App. 1940 ed., Supp. IV,

Sec. 925) (Appendix, *infra*), quoted for convenience in the footnote.⁴

Under the amendment, treble damages were denied and the amount of the recovery was limited to the overcharge or \$25, whichever was greater, if the defendant

⁴ SEC. 108. * * *

* * * * *

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

"(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine; *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

proved that the violation "was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." However, as already set forth, *supra*, under subpoint A, taxpayer's violations here were wilful and were not the result of failure to take practicable precautions against their occurrence. The applicable rule has recently been succinctly stated and authorities cited in *Woods v. Corsey*, 200 P. 2d 208, 211-212 (not yet officially reported), by the California District Court of Appeal, Second District, as follows:

It has been frequently held that a "willful" violation, within the meaning of the Price Control Act, is one which is intentional, knowing, voluntary, deliberate, or obstinate, although it may be neither malevolent nor with a purpose to violate the law. *Zimberg v. United States*, 1 Cir., 142 F. 2d 132, 137, 138; *Bowles v. Weitz*, D.C. Pa., 64 F. Supp. 829, 833; *Bowles v. Krasno Bros. Glove & Mitten Co.*, D.C. Wis., 59 F. Supp. 581; *Bowles v. Arcade Inv. Co.*, D.C. Minn., 64 F. Supp. 577. * * *

No evidence whatsoever of mistake or inadvertence on taxpayer's part is disclosed by the instant record. On the contrary, taxpayer has itself stipulated that it was furnished a copy of the governing maximum price regulation, was aware of its provisions, did not reduce its prices to its customers as required by the regulation, paid to the United States the sum of \$13,071 in settlement of the Administrator's claim for treble damages on account of violations of this regulation, and the sum was based upon sales made by taxpayer between February 1, 1943, and January 31, 1944, at prices in excess of the maximum prices established under the regulation. (R. 15-16, 81-83.) Hence, here, under the amended Section 205 (e), taxpayer was

liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the fol-

lowing sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine; * * *.

Again, as already stated, taxpayer concededly has not established that the \$13,071 paid to the United States did not include amounts in excess of the overcharges. (Br. 7.)

Section 205 (e), in its amended form here applicable, was broadened to enable the Administrator to institute an action on behalf of the United States even where a buyer (not buying for use in trade or business) might sue, in the event such a buyer failed to institute action within thirty days from the date of the violation. However, instantly it was stipulated, as the Tax Court found, that the sales were made (R. 16, 83)—

to customers who bought the castings for use or consumption in the course of their trade or business within the meaning of Section 205 (e) of the Emergency Price Control Act of 1942.

Hence, the instant case is one where in the language of the section the Administrator was expressly authorized to bring action on behalf of the United States since the buyer "is not entitled for any reason to bring the action". Such was "the Administrator's Claim for treble damages" in settlement of which the disputed sum was here paid. (R. 16, 82.)

Moreover, as will be seen below, the principal sanction afforded by Section 205 (e) was the Administrator's suit; the consumer's right of action was the incident, not the rule. This double sanction which Section 205 (e) provided in one part penal and in another remedial is certainly not unprecedented. Al-

most twenty-five years ago the Court of Appeals for the Second Circuit plainly delineated similar enforcement machinery where in *Sullivan v. Associated Bill-posters and Distributors*, 6 F.2d 1000, citing the leading case of *Huntington v. Attrill*, 146 U. S. 657, 667, 668, it said (p. 1009):

A statute may be penal in one part and remedial in another. If a statute which is penal in part gives a remedy for an injury to the person injured to the extent that it gives such a remedy it is a remedial statute, irrespective of whether it limits the recovery to the amount of actual loss sustained or as cumulative damages as compensation for the injury. [Cases cited.] But in so far as the statute authorizes a third person, not the loser, to recover treble damages, or the money lost, the statute is penal. [Cases cited.]

In *Porter v. Warner Co.*, 328 U. S. 395, the Supreme Court, analyzing the nature of the remedies afforded by Section 205 (e), characterized as "penalties" the money recoveries which came to the United States Treasury in suits brought by the Administrator⁵ authorized under its terms, as follows (pp. 401-402):

To the extent that damages might properly be awarded by a court of equity in the exercise of its jurisdiction under § 205 (a), see *Veazie v. Williams*, 8 How. 134, 160, § 205 (e) supersedes that possibility and provides an exclusive remedy relative to damages. It establishes the sole means whereby individuals may assert their private right to damages and *whereby the Administrator on behalf of the United States may seek damages in the nature of penalties*. Moreover, a court giving relief under § 205 (e) acts as a court of law rather than as a court of equity. * * *

⁵ Cf. *Testa v. Katt*, 330 U. S. 386, 389, in which the Court assumed without deciding that Section 205 (e) was a penal statute.

When the Administrator seeks restitution under § 205 (a), he does not request the court to award statutory damages to the purchaser or tenant or to pay such person part of the *penalties which go to the United States Treasury in a suit by the Administrator under § 205 (e)*. * * * (Italics supplied.)

Bowles v. Farmers Nat. Bank of Lebanon, Ky., 147 F. 2d 425 (C.A. 6th), directly supports the Commissioner's contention that the Administrator's cause of action under Section 205 (e), which taxpayer here settled, was for a penalty. There, the alleged violator of a price ceiling had died and the ultimate question was whether the Administrator's action survived against his executor. Thus, whether the Administrator's cause of action was penal in nature or not was immediately in issue, since if the action was penal, it did not survive. The court held that while private rights and interests were incidentally necessarily affected, the controlling purpose of the statute was to protect the public during the war emergency, and that the wrong which the Administrator's action redressed was a wrong to the public, not to any individual. (P. 428.) Listing the several remedies above mentioned which Section 205 authorized the Administrator to pursue, the court said (p. 428):

The suit for recovery is plainly intended by Congress to be used as a method of "enforcement" equally with the other methods prescribed. Hence we conclude that the manifest purpose of § 205 (e) was to prevent the inflationary tendencies sought to be curbed by the Act as a whole, through *punishment* of violators of the statute by payment of penalties either to the Administrator or to the person injured. (Italics supplied.)

Clearly as to the Administrator's suit, the damages imposed upon the violator were not compensatory; the

Government suffered no loss from the transaction. Moreover, in practice, the Administrator's suit was the rule, the individual buyer's, the exception. Thus, the court said (p. 428) :

In the present case recovery is to be paid not to the person injured, but to the Government. In fact in the majority of instances both original § 205 (e) and the amendment make it difficult for the purchaser to recover. As to all sales for use or consumption in the course of trade or business, that is as to the innumerable transactions in wholesale or retail trade the right of recovery is vested in the Administrator.

Similarly, the opinion in *Porter v. Elliott*, 69 F. Supp. 652 (E.D. Pa.), affirmed *sub nom. Fleming v. Elliott*, 163 F. 2d 215 (C. A. 3d), upon the authority of *Porter v. Montgomery*, 163 F. 2d 211 (C. A. 3d), emphasized these factors as illustrating the penal features of Section 205 (e), saying (p. 655) :

The suit for triple damages under Section 205 (e) was brought by a public official, the Price Administrator, on behalf of the United States, and this fact, we feel, manifests the intent of Congress—to afford public redress whenever and wherever a violation occurs in order to effectuate the purposes of the Act. The Act, in addition to giving to the Administrator the right to sue for triple damages in case of a violation, also confers a similar right upon an aggrieved party. This, however, does not alter the fact that Congress intended that the public should be redressed because in reality the instances where an individual institutes suit and not the Administrator are comparatively few, and further the right granted an aggrieved party is merely incidental to the essential purpose, that of enforcement of the provisions of the Emergency Price Control Act.

In *Porter v. Montgomery*, 163 F. 2d 211,⁶ the Third Circuit in a clearly reasoned decision likewise held that the Administrator's action under Section 205 (e) was penal and, hence, abated by reason of the death of the defendant. The Court said (p. 215):

A civil action is for damages if it is brought for the compensation of the injured individual. It is for a penalty if it seeks to obtain a sum of money for the state, an entity which has not suffered direct injury by reason of any prohibited action. In order to obtain damages the loss must flow out of the wrong and be its natural and proximate consequence. *Smith v. Bolles*, 132 U.S. 125, 130, 10 S. Ct. 39, 33 L. Ed. 279. A penalty need have no causal connection with the wrong inflicted. In a penal statute the penalty is inflicted by a law for its violation. In the case at bar the sum sought to be recovered by the Administrator clearly is not intended for compensation whereby Montgomery should reimburse or compensate any person whom he injured by sales above ceiling price. The sum sought to be recovered is in the nature of an exaction, to be levied upon Montgomery or his heirs as a penalty to aid in the prevention of a repetition of an offense prohibited by the Act.

Within the current year, in *Fields v. Washington*, 173 F. 2d 701, the Third Circuit has confirmed adherence to its ruling in *Porter v. Montgomery*, *supra*, and once more explained its rationale. Thus, in holding there that an action by an individual under another statute was not for recovery of a penalty, the court explained (p. 703):

Here, however, the suit is not by a public officer to recover a sum of money which will be paid into the public treasury. If so it would doubtless be a suit

⁶ Judge Stephens of this Court was one of the three judges who rendered this decision.

for a penalty and, therefore, cognizable under that section. *Porter v. Montgomery*, 3 Cir., 1947, 163 F. 2d 211. On the contrary, it is an action for damages brought to compensate the individual who has been injured. It is, therefore, not in any true sense of the term an action for a penalty. See *Huntington v. Attrill*, 1892, 146 U.S. 667, 673, 674, 13 S. Ct. 224, 36 L. Ed. 1123; *Sullivan v. Associated Billposters and Distributors*, 2 Cir., 1925, 6 F. 2d 1000, 1008, 1009, 42 A.L.R. 503; *Overnight Motor Transp. Co. v. Missell*, 1942, 316 U.S. 572, 583, 62 S. Ct. 1216, 86 L. Ed. 1682; and the discussion of the point by Judge Biggs in *Porter v. Montgomery*, 163 F. 2d 211, at page 215.

Other authorities holding the action one to recover a penalty are as follows: *United States v. Murray*, 75 F. Supp. 216 (N.H.); *Bowles v. Heckman*, 224 Ind. 46, 64 N. E. 2d 660; *Porter v. Russell*, 271 App. Div. 542, affirmed *sub nom. Fleming v. Russell*, 296 N.Y. 985; *Bledsoe v. Lumber Co.*, 229 N.C. 128, 134, 48 S. E. 2d 50, 55; *Bowles v. Barde Steel Co.*, 177 Ore. 421, 164 P. 2d 692; Oglebay, Provability and Dischargeability of Judgments Against Overcharging Merchants and Landlords Under Emergency Price Control Act, 21 Journal of the National Association of Referees In Bankruptcy 39 (January 1947); Oglebay, Some Developments In Bankruptcy Law, 22 Journal of the National Association of Referees In Bankruptcy 41, 44 (January 1948).

C. *The disputed payment was not made to the United States by way of restitution nor did the United States as sovereign appropriate it as bona vacantia.*

(1)

This Court has held that the right of action on behalf of the United States vested in the Administrator by Section 205(e), as amended, of the Emergency Price Control Act, *supra*, was intended by Congress primarily

as a deterrent to the violator rather than as a method of restitution to the buyer.⁷ Thus in *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431, certiorari denied, 329 U.S. 720, this Court ruled (pp. 434-435):

Congress intended the imposition of damages on the price violator primarily as a deterrent to the violator rather than as a method of restitution to the buyer. The provision of a \$25 minimum award, regardless of the excess over the maximum, clearly shows such intent. The buyer may not have suffered a dollar's damage above the illegal excess; indeed, by making the purchase he joyfully may have aided the seller in violating the law; he may believe the excessive price a fair one and no harm done him at all; but, nevertheless, he may recover the triple damages. Ordinary breaches of contract are not compensated by attorney's fees for the successful litigant. Here the price violator must pay them. The purchaser plaintiff in bringing his action is the instrument in accomplishing the Congressional purpose of preventing inflation, of which the Senate Report 931 of the 77th Congress, 2d Sess. stated

“ * * * of all the consequences of war, except human slaughter, inflation is the most destructive. * * * Rising prices and increases in the cost of living bring misery to our people, cause industrial unrest, and undermine our unity. * * * Living costs tend to rise more quickly than wages. [and] the burdens of war are haphazardly distributed, with the heaviest burden on the farmer, the salaried worker, the small investor, the pensioner, and the veteran, whose incomes cannot readily be expanded. Rising living costs mean labor disputes and spiraling wage demands. And the suspicion of profiteering causes discontent which hampers production are surely as the bombing of factories. Rising prices now foreshadow * * * deflation later with attendant depression and suffering. Such prospects

⁷ No criminal penalty is, of course, involved. *Kessler v. Fleming*, 163 F. 2d 464, 468 (C.A. 9th).

and fears * * * sap energy and morale now. Rising prices limit production. For price uncertainties prevent future planning and long-term commitments which are an integral part of the industrial process * * *.” (Italics supplied.)

Similarly in *Woods v. Corsey, supra*, in an action brought under the same statute by the Administrator citing and following the decision of this Court in *Porter v. Crawford & Doherty Foundry Co., supra*, the California District Court of Appeal held (p. 211):

If it be a fact that one or more of the tenants failed to pay the full amount of the overcharges, this would not constitute a defense to an action for the recovery of treble damages for the full amount of the overcharges. The charging of excessive rental is a violation of the act even though the amount be not collected.

In *Garcia v. Ebeling Motor Co.*, 201 P. 2d 854 (not yet officially reported), the California District Court of Appeal, Second District, again followed the holding of this Court in the *Crawford & Doherty Foundry Co.* case, *supra*, and of the Sixth Circuit Court of Appeals in the *Farmers Nat. Bank of Lebanon, Ky.*, case, *supra*. In this action by a purchaser, the seller was held liable for three times the amount of the overcharge fixed in a contract to sell an automobile at an overceiling price, even though the overcharge never had been paid. The court reiterated that recovery under this section was for a penalty and the circumstances that the Administrator might bring the action, if the buyer did not, indicated that the amount recovered was a penalty. Thus, the California court there said (p. 857):

All the arguments of appellant are based upon the erroneous assumption that the recovery allowed by the act is not a penalty. * * * It was not intended by the act, which was a measure necessary

in wartime to stabilize prices and prevent disruptive practices resulting from market conditions, that the only remedy of a victim of wartime profiteering is to pay the ceiling price and then engage in litigation or other controversy in an attempt to retain possession of the commodity purchased, to clear his title thereto, and to be relieved of his purported obligation to pay the overcharge. Various other provisions of the act, which are referred to in the case of *Duffy v. Howell*, hereinafter cited, also indicate that the amount to be recovered under the act is a penalty. Furthermore, the *fact that the administrator may bring the action, if the buyer does not bring it, indicates that the amount to be recovered is a penalty.* * * * (Italics supplied.)

After citing and quoting from the opinion of this Court in the *Crawford & Doherty Foundry Co.* case, *supra*, the opinion continued (p. 857) :

The amount to be recovered under the act is a penalty. In *Duffy v. Howell*, 73 Cal. App. 2d Supp. 990, at pages 992-993, 166 P. 2d 411, 413 the court said: "A study of the amended Act as a whole convinces us of the legislative intent to penalize the making of a contract for a sale in excess of the ceiling price regardless of whether the amount paid thereon was in full, or in a sum, by way of partial payment, less than the proper ceiling price. As evidence of such intent the terms 'sell' and 'buy' are so defined by section 942(a), 50 U.S.C.A. Appendix, as to include 'sales, * * * and other transfers, and contracts and offers to do any of the foregoing.' Section 904, 50 U.S.C.A. Appendix, to which such definitions are also applicable, makes it unlawful to 'sell or deliver any commodity' in violation of any price fixing regulation or order, or to offer or attempt to do so. Section 925 (e), 50 U.S.C.A. Appendix, under which this action is brought, also applies where any person 'selling a commodity' violates such a regulation, order or price schedule. The term 'price' is defined

by section 942 (b) as meaning 'the consideration demanded or received in connection with the sale of a commodity.' Section 925 (e) provides that 'the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price.' " It was also said correctly therein, 73 Cal. App. 2d Supp. at page 993, 166 P. 2d at page 414: "The penalty accrues when the overcharge on the price of a commodity is exacted, not when it is paid."

Again, the highest court of the State of New Jersey in *Zuest v. Ingra*, 134 N.J.L. 15, 45 Atl. 2d 810, referring to Section 205 (e) said (134 N.J.L. 17, 45 Atl. 2d 812) :

* * * we read the language of this Federal statute and regard the nature of its provisions as a delineation of an action for the recovery of a penalty and not as a compensating action, in the sense of making the injured party whole. * * *⁸

Further, the Court of Errors and Appeals there held (134 N.J.L. 18-19, 20, 45 Atl. 2d 812-813) :

But there is another feature in this Price Control Act indicative of its nature. The federal statute, *supra*, provides that in the event the individual suffering the injury fails to institute an action, under this section of the statute, the Federal Price Administrator may institute such action in behalf of the United States within a year from the date of the occurrence of the violation; and, further, that if the action be instituted by the Administrator the injured party shall thereafter be barred from bringing an action for the same violation. This, by plainest implication, outlines a penalty, not damages as such, because certainly the Price

⁸ The ultimate holding was that the action being penal, the state court of *limited* jurisdiction, in which it had originated, could not entertain it; thus, the cited case is not in conflict with *Testa v. Katt*, *supra*.

Administrator has suffered no damage because a landlord charges some individual an excessive rent. "Penalty" is defined in 25 C.J., § 72, under Fines, forfeitures, &c., thus: "A penalty is a sum of money of which the law exacts payment by way of punishment for the doing of some act that is prohibited or omitting to do some act that is required to be done." See, also, 36 C.J.S., *Fines*, § 1. The test of a penal law seems to be: Is the wrong sought to be redressed a wrong to the public or to the individual? *Huntington v. Attrill*, 146 U.S. 657, 668; 36 L. Ed. 1123. To overcharge or profiteer in the fact of an Act of the Congress forbidding it, during a time of national peril, is assuredly a public wrong. True it is done against the interests of an individual but that fact does not make it a private wrong. All public wrongs are done at the expense of one or a multitude of individuals.

Both the cited Sixth Circuit decision in *Farmers Nat. Bank of Lebanon, Ky.*, *supra*, and the Third Circuit decision in the *Montgomery* case, *supra*, involved, as here, Section 205(e), as amended by Section 108(b) of the Stabilization Extension Act of 1944. Significantly, both courts held that the Administrator's action, even where limited to the amount of the overcharge, remained a penalty. Thus, the court said in *Bowles v. Farmers Nat. Bank of Lebanon, Ky.*, *supra* (p. 430):

It remains to consider the effect of the amendment of 1944 above quoted, which makes it discretionary with the District Court whether treble damages shall be recovered and permits the person charged with liability to set up certain circumstances in mitigation of the damages. In view of the considerations stated above, we conclude that in this amendment also the purpose of the Congress is prevention of the practice of selling above ceiling prices, and that here too a penalty rather than damages is involved. The amendment simply provides that in case of good faith the penalty is less than in the case of fraud. A similar situation existed in

the statute construed in *Helwig v. United States*, *supra*, 188 U.S. 605 at page 612, 23 S. Ct. 427, 47 L. Ed. 614, and it was there held that the nature of the penalty is the same, only in one case it is satisfied by a lesser penalty than in the other.

Again, in the *Montgomery* case, *supra*, the Third Circuit observed that the circumstance that the judgment under Section 205(e) might amount to three times the amount of the overcharge was "not the touchstone to a correct decision" (p. 215), since under the amended statute, if the violation was not wilful nor the result of failure to take practicable precautions, the judgment might be limited to the overcharge (p. 215, fn. 11). The court concluded that the recovery by the Administrator, in either event, single or treble, was in the nature of an exaction, as a penalty to aid in the prevention of a repetition of the prohibited offense.

In *Porter v. Elliott*, *supra*, the District Court held (p. 655):

We believe that this amendment did not affect the original intent of Congress and that the purpose remained the prevention of the practice of selling above ceiling prices, and we conclude, therefore, the character of the statute continued to be penal. The amendment simply provides that in case of good faith the penalty is less than in the case of fraud.

Good faith and due care at no time afforded a defense to the penal provisions of Section 205(e); before the 1944 amendment they constituted grounds for appeal to administrative discretion to accept a lesser sum than treble damages; after the amendment the limitation of liability became statutory. *Bowles v. Franceschini*, 145 F. 2d 510, 512-514 (C.A. 1st); *Bowles v. Hasting*, 146 F. 2d 94, 95 (C.A. 5th); *Porter v. Bledsoe*, 159 F. 2d 495 (C.A. 4th); *Star Steel Supply Co. v. Bowles*, 159 F. 2d 812, 816 (C.A. 6th); *Armour & Co. v. Blindman*,

73 F. Supp. 609 (Minn.). At all times, whatever was exacted, was paid as a penalty,

Thus, the decision and reasoning of this Court in the *Crawford & Doherty Foundry Co.* case and of the other courts cited, *supra*, established that the *Rossman* case, is incorrect in holding (p. 712) that the Administrator's claim to recover the overcharge is a substituted claim for restitution, and that Congress did not intend a penalty. As these cases rule the terminal buyer may not have actually suffered a penny's loss—he may not have paid the overcharge at all—and, having suffered no loss, he will have had no semblance of a claim for restitution. Nevertheless, Congress intended, clearly as a deterrent, that the price violator should be mulcted in an amount from one to three times the overcharge for violating the law by selling above the ceiling price, even though he never received the overcharge. Certainly actions by the Administrator on behalf of the United States bore no color whatsoever of “restitution”; under no circumstances did the United States suffer financial loss. Single damages were no more paid in compensation to the United States than multiple damages. The United States had suffered no loss in any amount and every dollar paid to it was an exaction. The wrong which Congress intended the Price Administrator to redress was assuredly a public not a private wrong. The *Rossman* case to the extent that it holds to the contrary is, we respectfully submit, incorrect.

However, the *Rossman* case, it is to be noted, explicitly ruled that only as to the overcharge itself was the Administrator's claim one for restitution; the *Rossman* opinion assumed, though it did not decide, that any addition was a penalty, and that (p. 712)—

* * * a recovery of three times the overcharge is no less a recovery of the overcharge because it includes the penalty along with it. * * *

Here, as already several times noted, the sum of \$13,071 paid to the United States was not proved by taxpayer to have been limited to payment of the overcharge and hence even under the *Rossman* holding, taxpayer has not established here that the amount sought to be deducted did not include a penal sum. In any event, for the reasons above given and in reliance upon the numerous authorities above cited, the Commissioner contends that the claim of the United States for the overcharge itself could not have been intended by Congress to have constituted a claim for compensation or restitution, but in its entirety was exacted as a deterrent sanction and a penalty.

(2)

Equally unfounded appears to be the suggestion contained in the *Rossman* case (p. 712) that the Administrator's claim to the overcharge was based upon a right of appropriation by the sovereign to *bona vacantia* in cases where the terminal buyer was "inaccessible", i.e., unknown or unidentified, and therefore the United States succeeded to the "restitution" that was the property of the terminal buyer. In the first place, as the authorities above cited establish, action against the seller lay even though the terminal buyer had himself suffered no loss whatsoever, had not paid any overcharge, and was thus not entitled to "restitution".

Secondly, the common law doctrine of *bona vacantia* in its most extensive form referred to personal property, title to which had formerly been held by some individual who either had abandoned it or whose identity had become unknown. *Anderson Nat. Bank v. Lockett*, 321 U. S. 233, 240; *Illinois Bell Telephone Co. v. Slattery*, 102 F. 2d 58 (C.A. 7th); *State v. Phillips Petroleum Co.*, 212 Ark. 530, 534-537, 206 S.W. 2d 771, 773-775. In most aspects the doctrine is analogous to *escheat*, strictly applicable only to real property. The typical

case was death intestate with no next of kin known or capable of inheriting personal property. *Bona vacantia* applies to specific property, the right, title, and interest in which formerly was vested in some citizen; on the other hand, the Administrator's claim here certainly had never vested in any individual and from its inherent nature never could vest in any consumer. Under Section 205(e) of the Emergency Price Control Act, a terminal buyer's right of action might never come into existence. Indeed, in the majority of cases this consumer's right of action never arose, and he never became entitled to sue. There was, of course, no right of action in taxpayer's customers. The wholesale purchaser was regarded under Section 4(a), *supra*, of the Act *in delicto*, if not *in pari delicto* with the seller. Congress obliged both buyer and seller engaged in commerce to know the ceiling prices of the commodities with which they dealt; Congress imposed on both the responsibility of policing their industry. *Porter v. Bledsoe, supra*; *Armour & Co. v. Blindman, supra*; *Bledsoe v. Lumber Co., supra*.

Indeed, there is no proof whatsoever that a terminal buyer here was overcharged at all. Thus, there was no unclaimed property here (or in the typical case), belonging to any unknown individual which Congress could have intended by means of the Administrator's right of action under Section 205(e) to appropriate as *bona vacantia*.

Finally, any such right of appropriation must lie, not in the United States, but in the several states, since the property supposed to be appropriated is located, if anywhere, *in the several states* and belonging to their residents. For the purpose of application of the common law doctrines of escheat or *bona vacantia*, certainly the several states and not the United States are respectively the sovereign in whose favor those rules run. In-

deed, this is the very holding of the case upon which the *Rossman* opinion relies and quotes, namely *Anderson Nat. Bank v. Lueckett, supra*, where the Supreme Court said (p. 240) :

At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as *bona vacantia*. See 7 Holdsworth, A History of English Law (2d ed.) 495-496. Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, *exist in the several states of the United States*. * * * (Italics supplied.)

See also *United States v. Klein*, 303 U. S. 276, 280. Hence, with deference, the *Rossman* opinion notwithstanding, we submit that in creating the right of action on behalf of the United States under Section 205(e) Congress neither purposed nor could have properly exercised a sovereign right of appropriation of *bona vacantia*.

D. *Allowance of the deduction here would frustrate a sharply defined national policy*

(1)

Under well settled principles the effectiveness of a penalty imposed as a deterrent will not be partially impaired through its allowance as a deduction in computing income taxes. The intent of Congress was to enforce the public policy by exaction of the entire penal sum, not a discounted amount. To effectuate the policy of the law, the undiminished impact of the whole penalty collected must be felt by the violator; this aim is thwarted, if the penal payment itself may constitute the basis for tax reduction, since by indirection the sanction is correspondingly lessened. Such is the reasoning of the Court of Appeals for the Fifth Circuit,

following a settled line of authority, in *Commissioner v. Longhorn Portland Cem. Co.*, 148 F. 2d 276, certiorari denied, 326 U.S. 728, where it was said (p. 277):

The sense of the rule that statutory penalties are not deductible from gross income is that the penalty is a punishment inflicted by the state upon those who commit acts violative of the fixed public policy of the sovereign, wherefore to permit the violator to gain a tax advantage through deducting the amount of the penalty as a business expense, and thus to mitigate the degree of his punishment, would frustrate the purpose and effectiveness of that public policy.

Other authorities to the same effect are:⁹ *Great Northern Ry. Co. v. Commissioner*, 40 F. 2d 372 (C. A. 8th), certiorari denied, 282 U.S. 855; *Burroughs Bldg. Material Co. v. Commissioner*, 47 F. 2d 178 (C.A. 2d); *Chi. R. I. & P. Ry. Co. v. Commissioner*, 47 F. 2d 990, 991 (C. A. 7th), certiorari denied, 284 U.S. 618; *Tunnel R. R. v. Commissioner*, 61 F. 2d 166, 173-174 (C. A. 8th), certiorari denied, 288 U.S. 604; *National Outdoor Advertising Bureau v. Helvering*, 89 F. 2d 878, 881 (C.A. 2d); *Standard Oil Co. v. Commissioner*, 129 F. 2d 363 (C. A. 7th); *Helvering v. Superior Wines & Liquors*, 134 F. 2d 373 (C. A. 8th); *Universal Atlas Cement Co. v. Commissioner*, 171 F. 2d 294, certiorari denied, 336 U.S. 962; *Scioto Provision Co. v. Commissioner*,

⁹ On similar reasoning bankrupts who have violated laws passed for the public good cannot discount money sanctions imposed by going into bankruptcy. Thus, the imperative necessity of preventing misuse of other statutory remedies to frustrate penal sanctions enacted for the public welfare has in bankruptcy, even in absence of explicit statutory provision, contained in the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, resulted in a judicial holding that judgments for penalties are not provable and hence not dischargeable in bankruptcy. *In re Abramson*, 210 Fed. 878 (C.A. 2d); *In re Moore*, 111 Fed. 145 (W.D. Ky.); 3 Collier on Bankruptcy (14th ed., 1941), Section 63.12; Oglebay, *supra*, 21 Journal of the National Association in Bankruptcy 39.

9 T.C. 439; *Garibaldi & Cuneo v. Commissioner*, 9 T.C. 446. In the last two cases, sums paid to the United States for price ceiling violations were disallowed as deductions.

Commissioner v. Heininger, 320 U.S. 467, confirms the principle of the cited cases and the decision below, where the penalty incurred for violation of the federal statute was itself sought to be deducted (and not merely an expenditure bearing a remote relation to the illegal act).

Indeed, the *Rossman* opinion agrees that, although the Revenue Act does not expressly deny penalty deductions and (p. 713):

the doctrine is a judicial gloss—and, for that matter, a gloss of the lower courts only, save as the Supreme Court recognized it by implication in *Commissioner v. Heininger* * * * it is a proper gloss (indeed we have ourselves enforced it several times); and its justification is that, when acts are condemned by law and their commission is made punishable by fines or forfeitures, to allow these to be deducted from the wrongdoer's gross income, reduces, and so in part defeats, the prescribed punishment. Obviously, to relieve the wrongdoer of a part of the tax due upon his income, in effect is to remit that much of the sanction imposed; as would at once be apparent, if we were to compare the case of a wrongdoer who has an income with that of one who has none.

Considering the scope of the *Heininger* case, the Second Circuit Court of Appeals in the *Rossman* opinion said (p. 713):

It is possible to read it as distinguishing between the legal expenses of an unsuccessful defence and the payment of fines or forfeitures. On the other hand, it is also possible to read it as meaning that, whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends

upon the place of sanctions in the scheme of enforcement of the underlying act. We think that the second is the right reading; *in short that there are "penalties" and "penalties" and that some are deductible and some are not.* (Italics supplied.)

The *Rossman* case concluded that the holding of the Supreme Court in *Commissioner v. Heininger, supra*, was "that in every case the question must be decided *ad hoc*" (p. 713); in other words, in a given case, even though a payment by a taxpayer is indisputably a "penalty", each individual instance must be decided upon its own facts and taxpayers and the administrative officers of the Treasury must determine whether its allowance as a tax deduction would "frustrate" any "sharply defined" national or state policies proscribing particular types of conduct.

While it is true the Supreme Court in the *Heininger* case observed that (p. 473):

A review of the situations which have been held to belong in this category would serve no useful purpose for each case should depend upon its peculiar circumstances,

nevertheless, as the first of (p. 473) "A few examples * * * to illustrate the principle involved", it set forth unconditionally the following:

Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment.

This illustration afforded by the highest court of a situation, where tax deduction consequences would frustrate sharply defined policies, is expressed absolutely and without contingency.

In the nature of things it is submitted no distinction can properly be made between penalties and penalties, as suggested in the *Rossman* case. Indeed, the amount

of the penalty fixed by Congress is a binding legislative measure of the appropriate sanction. Congress thereby settles the full punitive consequence of the violation of law; surely, it is not the function of taxpayers, the Treasury or the courts to decide that in one case a discount should be permitted by indirection as an incident of tax collection and in another case the discount should be denied. In imposing a penalty, Congress intends its exaction without discount in every case and the categorical statement in the *Heininger* opinion approving without exception the denial of a tax deduction "where a taxpayer has violated a federal or a state statute and incurred a fine or penalty" (p. 473), supports this contention.

On the other hand, the *Rossman* holding would require taxpayers and the administrative officers of the Treasury to distinguish between cases where a statutory penalty has been exacted and to construe the intent of Congress or of forty-eight state legislatures in the case of every penal statute, in order to ascertain whether allowance by tax deduction of a given statutory penalty would or would not frustrate the legislative policy. Such a rule seems incapable of practicable administration and it is difficult to believe that Congress could have intended such an interpretation.¹⁰

¹⁰ Such indeed is the reasoning of this Court in an analogous situation, where in *Helvering v. Hampton*, 79 F. 2d 358, 360, it was said:

When we consider the difficulties of administering the law under a principle requiring the taxing officials to determine in every settlement made for an alleged business tort, the question whether it involved unethical conduct on the part of the business man or company seeking the deduction, it is difficult to believe that Congress could have intended such an interpretation of the act. Was the taxpayer driving the car sufficiently intoxicated at the moment of the collision—or, was the defective condition of taxpayer's falling elevator due to mere negligence or sufficiently gross misconduct—or, did the tax-

Indeed, although many courts have applied the governing principle, no other case has taken the *Rossman* distinction between “penalties” and “penalties”, nor permitted deduction of a payment concededly penal.¹¹ Thus, in *Commissioner v. Longhorn Portland Cem. Co.*, *supra*, the Fifth Circuit said (pp. 922-923):

The test *universally* employed to determine the applicability of the doctrine to any such claimed deduction is whether the sums claimed were paid as penalties.

* * * * *

Though the solution of such issues usually turns upon the taxpayer's guilt or innocence of a crime, the ultimate determinative inquiry upon this appeal is whether the deduction claimed was paid as a penalty. This is illustrated by cases where, due to a compromise settlement, the question of guilt or innocence was not established, yet the deduction claimed was disallowed to the extent that it represented a payment made to extinguish a cause of action to impose a penalty. (*Italics supplied.*)

As the cited case and the Second Circuit's own decision in *Universal Atlas Cement Co. v. Commissioner*, *supra*, among others, settled, even where the question of guilt or innocence is not established and the payment has been due to a compromise, the tax deduction is disallowed when made, as here, in satisfaction of claims by the sovereign, federal or state, for penalties. Moreover, here, violation of law is not in doubt, for taxpayer has conceded it.

payer surgeon use his scalpel in an operation with which he was sufficiently inexperienced—to warrant finding of moral turpitude? Numberless such questions would arise, impracticable of solution by the investigators and agents of the Treasury.

¹¹ While the *Rossman* opinion, as previously discussed, in its first part held the payment there to constitute “restitution” only, its latter part assumed alternatively “that we are wrong, and that the payment can be regarded as that of a penalty”. (P. 713.)

Again, the *Longhorn Portland Cement Co.* case (p. 922) supports our reading of the *Heininger* case, namely, that sums paid as penalties are never deductible, whereas expenses incurred even in the unsuccessful resistance of a penalty prosecution may be so remote as not required to be denied as a matter of law unless allowance would frustrate sharply defined public policies. Allowance of the penalty itself must necessarily mitigate the deterrent which Congress imposed; expenses in defense of prosecution certainly bear a remoter relation to the illegal act. Indeed, the reasoning of the *Rossman* case on the matter of deduction of the legal expenses of an unsuccessful defense (p. 713) appears to express an argument which the Supreme Court disapproved in the *Heininger* case, as follows (p. 472):

We think that this reasoning, though plausible, is unsound in that it fails to take into account the circumstances under which respondent incurred the litigation expenses.

In any event, the *Rossman* decision on this point also is distinguishable factually from the instant case in that there the violation was concededly unintentional, while here it was knowing and wilful; there, the payment to the United States concededly did not exceed the amount of the overcharge, here taxpayer has not proved that its payment to the United States of \$13,071 was limited to the overcharge.

(2)

Administrative rulings denying deductibility of payments made to the United States for violation of Section 205 (e) of the Emergency Price Control Act have over the course of the years consistently supported the Commissioner's position here. I. T. 3627, 1943 Cum. Bull. 111; I. T. 3799, 1946-1 Cum. Bull. 56, 57. Only

where the Administrator could not under the statute have compelled payment, were overcharges paid to him ruled deductible, as for example, "voluntary" payments made to the United States on account of price ceiling violations during the six months period January 30, 1942, the date of approval of the Act, to July 31, 1942, on which date Section 205 (e) became effective (I. T. 3627, *supra*, p. 113); payments made to the United States on account of overcharges to consumers or users made before the 1944 amendment (after July 31, 1942, and before July 1, 1944), during which period no right of action based on sales to consumers was vested in the United States (I. T. 3630, 1943 Cum. Bull. 113, and I. T. 3800, 1946-1 Cum. Bull. 82, 83).

The disallowance by these administrative rulings of payments made to the United States is not inconsistent with the Treasury's allowance of such payments as deductions when made in satisfaction of a consumer's claim for overceiling violations, but accords with the rule long settled in the federal courts, discussed *supra*, distinguishing between the grant of a civil right of action to a private person and a deterrent sanction exacted by the state possessing no compensatory character whatsoever. *Huntington v. Attrill*, *supra*; *Overnight Motor Co. v. Missell*, 316 U. S. 572, 583; *Sullivan v. Associated Billposters and Distributors*, *supra*; *Fields v. Washington*, *supra*. In any event, it surely assists taxpayer in no way here, should it be supposed that the Commissioner has been over-generous in permitting allowances in the case of consumers' claims.

Moreover, the administrative practice in the enforcement of the emergency price legislation demonstrates that the exaction of the overcharge from price violators was considered a deterrent by the authorities who collected it. Certainly, the inference seems plain that a

mitigation of this sanction would have been regarded as frustrating the statutory policy, in such a case, as here, involving wilful and knowing violations.¹² This appears not only from the cases cited, *supra*, but from a statement of O.P.A. enforcement policy submitted in 1945 by Administrator Bowles at a Hearing of the Senate Committee on Banking and Currency then considering extension of price control. The Administrator made clear that settlements of violations for the amount of the overcharge were primarily exacted both under the 1942 Act and the 1944 amendment, for "the deterrent effect of the sanction." (Senate Hearings Before the Committee on Banking and Currency on S. J. Res. 30, 79th Cong., 1st Sess., p. 95.)¹³ Again, in a statement issued on signing the Act containing the 1944 amendment to Section 205 (e), President Roosevelt clearly implied that the governing 1942 Act contained "penalties against non-willful violations" which the amended Act was "relaxing" (not extinguishing), and that in any event no favor was being thereby shown

¹² The quotation in the *Rossman* opinion (p. 714) from a letter by the Price Administrator is not to the contrary, and in any event refers only to cases involving innocent violations.

¹³ The full statement of the Administrator in this connection reads as follows (Senate Hearings, *supra*, pp. 89, 95):

The provision [under the 1944 amendment] limiting the Administrator to the amount of the overcharge where the violator could show that the violation was not willful nor the result of failure to take practicable precautions, altered what Congress decided to be an inequitable feature of the original law. It was always the policy of the Administrator to offer to settle such cases for the amount of the overcharge, and the chief drawbacks of the amendment were to introduce further complex issues into the investigation and proof and to make the settlement of cases without litigation more difficult. It also lessened somewhat *the deterrent effect of the sanction* but this was minimized by the retention of the treble damage feature for cases of proven willfulness. On the whole, we feel that thus far the amendment has worked out satisfactorily and we do not suggest that it be modified. (Italics supplied.)

to the wilful violator.¹⁴ Instantly wilful violation is involved.

(3)

In *Textile Mills Corp. v. Commissioner*, 314 U. S. 326, 338, the Supreme Court pointed out that the words "ordinary and necessary" are not so clear and unambiguous in their meaning and application as to leave no room for interpretative regulation, nor that the Treasury there usurped legislative function when it excluded from their import expenses incurred under contracts that might tend to spread insidious influences through legislative halls. In the *Heininger* case, *supra*, the Court emphasized the independent function of the Tax Court in interpreting and applying the statutory language to a particular set of facts and the essentially factual nature of the question as to whether a particular expenditure is directly related to a business and whether it is ordinary and necessary. (Pp. 470, 475.) In *Helvering v. Hampton*, *supra*, this Court explained the reason for the rule here governing as follows (p. 359)—

the allowance of the claimed deduction is refused because it consists of a fine for violating governmental statutes or regulations or legal expenditure in defense of prosecutions for such offenses. The basis of these decisions is that the taxpayer, in offending the state or federal government, is engaged in a transaction which governmental policy forbids being considered as a part of the business.

* * *

¹⁴ Statement of President Roosevelt on Signing the Stabilization Extension Act of 1944, June 30, 1944, 1 Pike & Fischer, O.P.A. Service, p. 2:249 (1942):

I know that the Congress *in relaxing the penalties against non-wilful violations* was anxious to protect only those acting in good faith and not those who do not wish to know what the law requires of them. But I fear that the changes made will weaken and obstruct the effective enforcement of the law. I hope that experience may not justify my fear. (Italics supplied.)

So here, the decision of the Tax Court on the instant record, having taken into account the presumption supporting the Commissioner's ruling, ought not to be reversed; certainly its construction of the words "ordinary and necessary" and their proximate relation to the business is permissible. In *Burroughs Bldg. Material Co. v. Commissioner*, *supra*, the Court of Appeals for the Second Circuit quoted with approval language from an English case (*Inland Revenue Commissioners v. Von Glehn*, [1920] 2 K. B. 553), which had denied deduction as a business expense of a penalty imposed for innocent violation of customs laws, as follows (p. 179):

Thus Warrington, L. J., remarked in *Inland Revenue Commissioners v. Von Glehn*, *supra*:

"* * * It cannot be said that this disbursement was made in any way for the purpose of the trade or for the purpose of earning the profits of the trade. It was made * * * because the individuals who were conducting the trade had * * * been guilty of an infraction of the law."

See, also, the similar reasoning of the same Court of Appeals in the *National Outdoor Advertising Bureau* case, *supra*, where it was held with respect to such expenditures (p. 881)—

that even though they might be "ordinary" in the sense that they were not unusual, they could not be "necessary," since the law will not recognize the necessity of engaging in illegal courses in the conduct of a business.

Surely, deductions as grants made in the exercise of legislative grace must not be perverted to frustrate national policy, and the Tax Court did not err here in interpreting the language of the statute to prevent such misuse. On the other hand, as is well settled, in apply-

ing such legislative grants equitable considerations have no place (*Deputy v. duPont*, 308 U. S. 488, 493); and as we have seen, *supra*, the burden is incumbent upon taxpayer to establish its clear right to a claimed deduction. Thus, recently, the First Circuit in *Friedman v. Delaney*, 171 F. 2d 269, 270, certiorari denied, 336 U. S. 936, said:

We are obliged to inquire whether the circumstances of this loss—no matter how creditably incurred—are clearly within the coverage of either Section referred to. Nor can equitable considerations be allowed to control.

Finally, the conclusion of the Court of Appeals for the Second Circuit in the earlier *Burroughs Bldg. Material Co.* case, *supra*, seems better founded on principle and authority than the distinction expressed in the recent *Rossman* opinion (p. 180):

But, whatever reasoning be adopted, it is a fact that both in this country and England fines have not been allowed as business expenses even when they were due either to incidents of the business almost inevitable or to innocent mistakes. * * *

We submit that the Supreme Court did not reject this rule in the *Heininger* case.

Furthermore, certainly where, as here, the violation was knowing and wilful, and not due to an "almost inevitable" incident of business or to an "innocent mistake," the *Heininger* case supports the disallowance of the penalty payment. Even on the distinction taken in the *Rossman* case (p. 714), the allowance of the deduction here of the penal sum paid to the United States in settlement of wilful violation and not shown to have been limited to the overcharge, would frustrate the sharply defined policy of Congress proscribing profiteering in time of national emergency.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or Business Expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * *

(26 U.S.C. 1946 ed., Sec. 23.)

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23:

SEC. 205 * * *

* * *

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for \$50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorney's fees and costs as determined by

the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act.

(50 U.S.C. App., 1940 ed., Supp. III, Sec. 925.)

Stabilization Extension Act of 1944, c. 325, 58 Stat. 632:

SEC. 108. * * *

(b) Subsection (e) of section 205 of the Emergency Price Control Act of 1942, as amended, is amended to read as follows:

“(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney’s fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50, as the court in its discretion may determine: *Provided*,

however, That such amount shall be the amount of the overcharge or overcharges or \$25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered."

(c) The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the

date of enactment of this Act and with respect to proceedings instituted thereafter.

(50 U.S.C. App., 1940 ed., Supp. IV, Sec. 925.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (a)-1. *Business Expenses*.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23 (b) to 23 (z), inclusive, and the regulations thereunder. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Penalty payments with respect to Federal taxes, whether on account of negligence, delinquency, or fraud, are not deductible from gross income. * * *

* * * * *

SEC. 29.23 (q)-1. *Contributions or Gifts by Corporations*.—* * * Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

* * * * *

No. 12295.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL BRASS WORKS, INCORPORATED,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF FOR PETITIONER.

FILED

DEC 17 1949

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REPLY BRIEF FOR PETITIONER.

As we understand the Respondent's argument, it may be briefly summarized as follows:

1. Under *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d 711 (C. C. A. 2), a payment to the United States by one who overcharged his customers in violation of the Emergency Price Control Act may be deductible if the violation was not wilful and the seller did not pay more than the overcharge to the United States. But the petitioner here was guilty of a wilful violation and paid more than the precise overcharge to the United States.

2. The *Rossman* case was wrongly decided. Every payment to the United States by an O. P. A. overcharger is necessarily a penalty which cannot be deducted.

A. The Tax Court Failed to Find That the Petitioner's Violations of the Emergency Price Control Act Were Wilful, or That the Petitioner Paid More Than the Face Amount of the Overcharges.

The Respondent's argument depends almost exclusively upon two "facts" which, it is strenuously urged, distinguish this case from *Jerry Rossman Corporation v. Commissioner, supra*. These "facts" are: (1) The petitioner wilfully and deliberately violated the Emergency Price Control Act (Resp. Br. pp. 5, 6, 9, 10, 11, 13, 14, 17, 18, 20, 42, 44, 47); and (2) the petitioner paid more than the face amount of the overcharges to the Office of Price Administration (Resp. Br. pp. 6, 8, 9, 14-15, 21, 34, 42). Indeed the Respondent relies so heavily upon these two "facts," that whenever he ventures a direct attack upon the holding of the *Rossman* case, he is careful to retreat from each attack to the safe harbor which these two "facts" conveniently provide. See Respondent's Brief, pp. 8, 9, 10, 34, 42, 47.

However, as this Court has emphasized time and again, fact finding is exclusively the business of the Tax Court,¹

¹*Helvering v. Rankin*, 295 U. S. 123, 131-132; *Helvering v. Richter*, 312 U. S. 561, 562; *Munter v. Commissioner*, 331 U. S. 210, 216; *Commissioner v. Culbertson*, 337 U. S. 733, 748; *Harbor Plywood Corp. v. Commissioner*, 143 F. 2d 780, 783 (C. C. A. 9); *Belridge Oil Co. v. Helvering*, 69 F. 2d 432, 433 (C. C. A. 9); *Belridge Oil Co. v. Commissioner*, 85 F. 2d 762, 768 (C. C. A. 9); *Anderson v. Commissioner*, 78 F. 2d 636, 637 (C. C. A. 9); *Eaton v. Commissioner*, 81 F. 2d 332 (C. C. A. 9); *Fulton Oil Co. v. Commissioner*, 81 F. 2d 330, 332 (C. C. A. 9); *Dornbecher Mfg. Co. v. Commissioner, supra*; *Diller v. Commissioner*, 91 F. 2d 194 (C. C. A. 9); *Kelleher v. Commissioner*, 94 F. 2d 294 (C. C. A. 9); *Aronson v. Commissioner*, 98 F. 2d 23 (C. C. A. 9). See also *Bell v. Commissioner*, 139 F. 2d 147, 149 (C. C. A. 3); *Stoddard v. Commissioner*, 141 F. 2d 76, 79 (C. C. A. 2); *Dent v. Alaska Placer Co.*, 177 F. 2d 8 (C. C. A. 9). Cf. *Commissioner v. Boeing*, 106 F. 2d 308-309 (C. C. A. 9).

and the Tax Court has not found the “facts” which are the cornerstone of the Respondent’s argument. There is no need to question the license of any advocate, including Government Counsel, to make legal arguments premised on facts which the trial court did not find.² For this Court’s position on fact finding has been stated with crystal clarity. As this Court said in *Doernbecher Mfg. Co. v. Commissioner*, 80 F. 2d 573 (C. C. A. 9):

“If the Board has failed to make an essential finding and the record on review is insufficient to provide the basis for a final determination, the proper procedure is to remand the case for further proceedings before the Board. Compare *Helvering v. Taylor*, 293 U. S. 507, 755 S. Ct. 287, 79 L. Ed. 623; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 308, 53 S. Ct. 161, 77 L. Ed. 318. The same procedure is appropriate even when the findings omitted by the Board might be supplied from examination of the record.”

The circumstances of this case graphically illustrate the wisdom of the appellate courts in refusing to make findings of fact. When the Tax Court decided this case, it had already held that *any* payment by an O. P. A. violator

²The Respondent’s persistent advocacy well beyond the record reaches a remarkable crescendo when he says:

“In the instant case, taxpayer during the period of the entire year commencing February 1, 1943, and ending January 31, 1944 [R. 15-16, 81-83], precisely when the war emergency was at its height and the disruptive influences of inflation most serious, committed wilful violations of the maximum prices fixed by law and knowingly entered into a course of conduct which tended to defeat the Congressional objective and the chosen method for achieving that objective, namely, to protect the nation from that inflation, which, as has been seen, the Senate Committee regarded as the most destructive consequence of war except human slaughter. Brief for Respondent, pp. 17-18.

to the Government was a nondeductible penalty. *Scioto Provision Company v. Commissioner*, 9 T. C. 439 (1947); *Jerry Rossman Corporation v. Commissioner*, 10 T. C. 468 (1948).³ As a result, the "facts" now found in the Respondent's brief were wholly irrelevant. Under the then prevailing theory of the Tax Court it was unnecessary to determine (a) whether the taxpayer paid to O. P. A. the face amount of the overcharges or something more, and (b) whether the taxpayer's violation was deliberate and wilful. Indeed, the Respondent's brief to the Tax Court did not even make an appropriate request that the Tax Court determine these factual questions.

If the "facts" now found by the Respondent are truly relevant, as the Respondent's brief implicitly concedes, the Tax Court necessarily tried and decided the case on the erroneous legal theory that no payments to O. P. A. are deductible, and because of this erroneous theory the Tax Court failed to pass upon the factual issues which the Respondent now apparently considers crucial.

The circumstances of this case clearly require a further hearing in addition to further findings if the case is to be remanded to the Tax Court. The Respondent infers, although the Tax Court made no such finding, that the petitioner settled the Government's treble damage claim by paying treble damages. The Government records are probably the best evidence as to whether the O. P. A. accepted the face amount of the overcharges or exacted an additional sum. Since the trial the Government has indicated that records in its possession show that petitioner paid only the face amount of the overcharges in settle-

³Rev'd 175 F. 2d 711 (C. C. A. 2).

ment of the Government's claim. The Commissioner's brief to the Court of Appeals for the Second Circuit in *Jerry Rossman Corporation v. Commissioner* states:

" . . . The Tax Court has in four cases denied deductions of payments made to the Price Administrator in compromise of claims for alleged price ceiling violations under Section 205(e). *Scioto Provision Co. v. Commissioner*, 9 T. C. 439; *Garibaldi & Cuneo v. Commissioner*, 9 T. C. 446; *Nazareth Mills, Inc. v. Commissioner*, decided February 16, 1949 . . . ; *National Brass Works v. Commissioner*, decided March 24, 1949 . . . In all these cases the penalty amounted only to the overcharge, except in *Garibaldi & Cuneo v. Commissioner, supra*, where it was one and a half times the overcharge." *Jerry Rossman Corporation v. Commissioner*, Brief for Respondent, pp. 36-37.

This statement by the Commissioner that O. P. A. accepted the face amount of the overcharges in settlement of its claim against National Brass Works is obviously not based upon the Tax Court's findings or the record in this case. It is entirely possible that this fact was gleaned from Government files which showed that in this case O. P. A. accepted simple overcharge payments in settlement of treble damage claims. If so, under the *Rossman* decision the acceptance of the face amount of the overcharge was an administrative determination that the particular violation was neither wilful nor the result of a failure to take practicable precautions. *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d at 714. This administrative determination would rebut the inference which the Respondent has drawn here, contrary to its own brief in the *Rossman* case and without the benefit of a Tax

Court finding, that petitioner wilfully overcharged its customers. Proof that the O. P. A. Administrator accepted the overcharge payment in settlement would bring this case squarely within the orbit of *Jerry Rossman Corporation v. Commissioner*, and pose for the Tax Court the very question which the Respondent seeks to avoid here by arguing outside the record.

It is, of course, possible that on remand the Tax Court may find that the petitioner paid the overcharges plus an additional sum. But even if the petitioner paid an amount in addition to the overcharges, it is still true that at the very least petitioner may deduct the overcharge payments themselves. As the Court of Appeals for the Second Circuit said in the *Rossman* case:

“(R)ecovery of three times the overcharge is no less a recovery of the overcharge because it includes the penalty along with it. Hence, if the taxpayer had been able to distribute the overcharge to the ‘terminal buyers’ and had done so, the distribution would have been deductible . . . the Administrator’s claim, like the ‘terminal buyer’s’ claim for which it is a substitute, is also made up of the overcharge and an addition of twice its amount . . .”
175 F. 2d at 712.

The Tax Court did not anticipate any distinction between the payment of overcharges and any payment beyond the overcharges. Therefore, a decision on the merits should await a Tax Court finding as to how much, if anything, the petitioner paid in excess of the overcharges it collected from its customers. See *Cohan v. Commissioner*, 39 F. 2d 540 (C. C. A. 2), cited with approval in *Roberts v. Commissioner*, 176 F. 2d 226 (C. C. A. 9). Even if there should be a complete failure of proof on

remand, it is clear as a matter of law that at least one third of the petitioner's payment represented the overcharges and is deductible.

At the very least, therefore, the case must be remanded to the Tax Court for further hearings and findings of fact. *Culbertson v. Commissioner, supra*; *Fulton Oil Co. v. Commissioner, supra*; *Kellaher v. Commissioner, supra*; *Aronson v. Commissioner, supra*.

B. The Tax Court Erroneously Decided That the Deduction of Overcharge Payments to the United States Would Frustrate a Sharply Defined Public Policy.

The Respondent seems to recognize that if this Court declines the Respondent's invitation to usurp the fact finding function of the Tax Court, the affirmance of the Tax Court's decision would directly contradict the decision of the Court of Appeals for the Second Circuit in *Jerry Rossman Corporation v. Commissioner*. Accordingly, the Respondent urges that the *Rossman* case was wrongly decided.

The basic legal question in both the *Rossman* case and this case has been framed by the Supreme Court in *Commissioner v. Heiniger*, 320 U. S. 467, 473. The question is whether the allowance of the deduction claimed would "frustrate . . . sharply defined national . . . policies proscribing particular types of conduct." The national policy with regard to those who overcharged in violation of the Emergency Price Control Act was sharply defined by those primarily concerned in articulating and executing that policy—the Congress and the O. P. A. Administrator.

The authoritative Congressional policy reflected by the Price Control Act has been outlined for the Court in a brief filed in this case by Pacific Mills as *amicus curiae*. Brief *amicus curiae* pp. 10-18. Respondent has conspicuously refrained from commenting on the relevant legislative materials as if they did not exist.

We do not wish to burden the Court by reviewing these materials here. They plainly show that in the eyes of Congress the payment of an overcharge was not a penalty, and that the deduction of an overcharge payment would not frustrate any sharply defined public policy.

The Respondent contends that the deduction of overcharge payments would violate a sharply defined public policy because:

1. Some courts in far different contexts have said that overcharge payments to the United States are penalties.
2. The payments must be penalties because they are not restitution.
3. The payments must be penalties because they were collected by the United States to deter violations of the Emergency Price Control Act.

We believe that these arguments are easily answered:

1. The judicial statements upon which the Respondent relies were not at all concerned with the present issue of proper tax incidence. Moreover, the present issue, which turns upon the national price control policy, must necessarily be resolved in the light of that policy as articulated by Congress.

2. The Respondent's argument that overcharge payments must be penalties because the United States did not collect them as restitution is completely question begging. The argument presumes that payments to the Price Administrator must fall into one of two rigid categories: (a) Penalty payments, which are not deductible, and (b) restitution payments, which are deductible.

This arbitrary distinction between restitution and penalty exposes a fundamental fallacy in the Respondent's case. His argument is that any payment to the Government which is not restitution must by sheer definition be a penalty which is not deductible. Needless to say, this argument is an obvious oversimplification. For example, as the *amicus curiae* has pointed out, a farmer pays a "penalty" to the Government if he markets certain products in excess of quotas established by the Government. These payments are not restitution; nevertheless they are deductible. I. T. 3530, C. B. 1942-1, p. 43.

Clearly, under the *Heininger* decision restitution cannot be a test of deductibility. The test is whether the deduction of a particular payment to the Government would frustrate a sharply defined public policy. And the legislative materials rebut the Commissioner's contention that the deduction claimed would frustrate any such policy.

3. Similarly the Respondent is hardly more persuasive when he argues that an overcharge payment to the Government is necessarily a penalty because of its deterrent effect. Any sanction enforced by law has a deterrent effect. For example, the right to recover for a breach of contract or a tort necessarily discourages the commission of a breach or a tort. Yet this Court has held that payments on tort claims are deductible despite their obvious

deterrent effect. *Helvering v. Hampton*, 79 F. 2d 358 (C. C. A. 9.) Furthermore, in the context of the Emergency Price Control Act it is impossible to distinguish, from the seller's point of view, between the deterrent effect of a consumer's right to sue for overcharges and the Administrator's right to do likewise. And, more directly, the Commissioner of Internal Revenue has held that overcharges and damages beyond overcharges paid to the consumer are deductible. I. T. 3627, C. B. 1943, p. 111. In this posture of the law it is difficult for the Commissioner to rely upon the deterrent effect of overcharge payments as the reason for barring their deduction.

In short, the question here, as in the *Rossman* case, is whether the deduction of overcharge payments to the United States would frustrate some sharply defined public policy. We submit that in *Jerry Rossman Corporation v. Commissioner*, *supra*, the Court of Appeals for the Second Circuit correctly decided that the deduction of overcharges paid to the United States would not frustrate any sharply defined public policy. The Tax Court decision here to the contrary should be reversed and the case remanded for further proceedings and findings.

Respectfully submitted,

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